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## Dual Class Shares in Canada: An Historical Analysis

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*Dual class shares have been used by Canadian corporations to access public capital markets for the past sixty years. The debates surrounding the regulation of dual class shares have been reenergized. The authors of this article argue that only by looking to the legitimating role of nationalist policy, legislation and discourse in the historical development of dual class share structures can we derive context to the current debates surrounding the regulation of dual class shares and obtain a fuller understanding of the contemporary issues they present. Based on an analysis of the use of dual class shares as a financing technique over the past six decades, the central claim made in this article is that the legitimating function of nationalist policies, legislation and discourse provides the most compelling explanation for the persistence of dual class shares in Canada. The authors argue that reliance on policy, legislation and discourse that addressed concerns regarding foreign ownership and domination of Canadian business best accounts for the proliferation of dual class share structures in the 1970s, and their continued use in the current context. Their analysis also explores various themes that have operated alongside or in opposition to nationalist policies, legislation and discourse: the concentration of ownership of Canadian business, the roles of multiple regulators in securities and corporate law, convergence between shareholders and other stakeholders, and rising shareholder activism.*

*Depuis quelque soixante ans, les sociétés canadiennes utilisent la possibilité d'émettre des actions de deux catégories pour avoir accès aux marchés financiers. Le débat qui entoure la réglementation des deux catégories d'actions a repris de la vigueur. Les auteurs de l'article avancent que ce n'est qu'en tentant de légitimer le rôle des politiques, des lois et du discours nationalistes dans le développement historique des structures à deux catégories d'actions qu'il est possible de comprendre le contexte des débats actuels entourant la réglementation des actions de deux catégories et de bien comprendre les problèmes qu'ils soulèvent. Fondé sur une analyse de l'utilisation, au cours des six dernières décennies, de deux catégories d'actions comme technique de financement, l'argument essentiel avancé dans cet article est que la fonction de légitimation des politiques, des lois et du discours nationalistes sont l'explication la plus convaincante de la pérennité, au Canada, de l'existence de deux catégories d'actions. Les auteurs allèguent que la confiance dans les politiques, dans les lois et dans les débats qui traitaient des considérations relatives à la propriété et à la domination étrangères des entreprises canadiennes est la meilleure explication pour la prolifération des structures à deux catégories d'actions des années 1970, structures qui sont toujours utilisées aujourd'hui. Leur analyse porte en outre sur divers thèmes qui ont eu cours en parallèle ou en opposition aux politiques, aux lois et au discours nationalistes : la concentration de la propriété d'entreprises canadiennes, le rôle des multiples organismes de réglementation dans le domaine des valeurs mobilières et du droit des sociétés, la convergence entre les actionnaires et d'autres parties intéressées et l'activisme croissant des actionnaires.*

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### *Introduction*

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### *Introduction*

Dual class shares have been used by Canadian corporations to access public capital markets for the past sixty years.<sup>1</sup> In such corporations, the two central features of share ownership - finance and control - are separated. Beginning in the 1940s, a handful of companies incorporated non-voting shares into their financing structures, including British Columbia Packers Ltd., Lawson & Jones Ltd., Robinson Little & Co. Ltd., Silverwood Industries Ltd., Traders Group Ltd., and Westfair Foods Ltd.<sup>2</sup> The 1950s and 1960s saw an increasing number of corporations issuing non-voting or subordinate voting shares largely as a means for majority shareholders to retain control of the corporation while undergoing expansion through access to public markets. By the late 1970s and early 1980s, the number of companies listing dual classes of shares on the Toronto Stock Exchange (TSE) dramatically increased. Currently, corporations that hold dual class share structures account for approximately twenty to twenty-five per cent

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1. Dual class shares, in this paper, refer to common shares that carry different voting rights and may include restricted voting, subordinate voting, and non-voting shares.

2. Toronto Stock Exchange, "The Toronto Stock Exchange Submission to the Ontario Securities Commission Concerning the Regulation of Non-voting, Multiple Voting and Restricted Voting Common Shares" (September 1981) [unpublished], Appendix D, Special Shares Listed on the Toronto Stock Exchange [TSE Submission].

of those listed on the TSE.<sup>3</sup> Within an historical and legal framework, this article addresses the backdrop in which dual class shares have gained resilience as a Canadian corporate financing tool.

Based on our analysis of the use of dual class shares as a financing technique over the past six decades, the central claim we make in this article is that the legitimating function of nationalist policies, legislation, and discourse provides the most compelling explanation for the persistence of dual class shares in Canada. We argue that reliance on policy, legislation, and discourse that addressed concerns regarding foreign ownership and domination of Canadian business best accounts for the proliferation of dual class share structures in the 1970s, and the continued use of dual class shares in the current context. Our analysis also surfaces various themes that have operated alongside or in opposition to nationalist policies, legislation, and discourse: the concentration of ownership of Canadian business, the roles of multiple regulators in securities and corporate law, convergence between shareholders and other stakeholders, and rising shareholder activism.

Historically, in the face of multiple regulators and a range of corporate and securities statutes, the unifying theme of nationalism has been effective in legitimating and limiting regulation of dual class shares even when it was clear that they were inconsistent with core Canadian values. The core Canadian values we refer to in this article include democratic values and values specific to the corporate context relating to performance and profit. The concentration of corporate ownership in Canada has limited the ability of shareholders and other stakeholders to effectively challenge the use of dual class shares. However, a number of instances can be observed where shareholders and other corporate stakeholders' interests converged and gained prominence in light of corporate governance scandals. In these situations, corporate stakeholders have been able to overcome the limits of a small, highly concentrated Canadian market and expose the inconsistencies between dual class shares and core Canadian values. In the current context, even in the face of continued reliance on nationalist policy, legislation, and discourse, the rising activism of shareholders combined with a number of high profile corporate governance scandals has exposed to regulators and the media that dual class shares are inconsistent with core Canadian values. The debates surrounding the regulation of dual class shares have been reenergized. Only by looking to the legitimating

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3. Shareholder Association for Research and Education, "Second Class Investors: The Use and Abuse of Subordinated Shares in Canada" (April 2004), online: Shareholder Association for Research and Education <<http://www.share.ca/files/pdfs/SHARE%20Dual%20Class%20-%20final1.pdf>> at 5 [Second Class Investors].

role of nationalist policy, legislation, and discourse in the historical development of dual class share structures can we derive context to the current debates surrounding the regulation of dual class shares and obtain a fuller understanding of the contemporary issues they present.

Part I of this article begins to address the question of why, despite a dissonance with core Canadian values, dual class shares have persisted and proliferated. This part demonstrates the legitimating function that nationalist policy, legislation, and discourse played in the legal, policy, and market frameworks that promoted the use of dual class shares in Canada. Part II then addresses the function of nationalist policy, legislation, and discourse in the responses to the use of dual class shares, including those of regulators, stock exchanges, issuers and investors. This article concludes by highlighting the links between the themes and responses identified in Parts I and II and the contemporary Canadian context.

### *I. Dual class shares: legal, market, and policy framework*

#### *1. The legal framework: emergence and evolution*

The use of dual class shares as a financing technique in Canada was facilitated by corporate statutes that permitted express deviations, in articles of incorporation or by-laws, from the common law default rule of one vote per share. The ability of corporations to make such deviations finds its roots in nineteenth-century legislation. Legislation during this time period can be categorized by three different types of statutes: statutes that created individual corporations, statutes that established terms that authorized the creation of corporations by private individuals or public authorities, and statutes that established terms that governed all corporations or corporations of a special kind.<sup>4</sup>

The general incorporation act for manufacturing, mining, mechanical or chemical enterprises, passed by the parliament of the united provinces (of Upper and Lower Canada) in 1850, mandated that shareholders were entitled to as many votes as they held shares.<sup>5</sup> Among individual statutes, the power of shareholders was not allocated uniformly among all corporations.<sup>6</sup> In Canada West (Ontario), prior to the 1850s, many of the individual incorporation statutes imposed limitations on the voting power of large shareholders: voting power decreased as the number of shares owned increased, while sometimes a maximum number of votes for each

4. R.C.B. Risk, "The Nineteenth-Century Foundations of the Business Corporation in Ontario" (1973) 23 U.T.L.J. 270 at 272.

5. An Act to provide for the formation of Incorporated Joint Stock companies, for Manufacturing, Mining, Mechanical or Chemical purposes, P.C.S. 1850, c. 28, s. V.

6. Risk, *supra* note 4 at 289.

shareholder was imposed.<sup>7</sup> By the mid-1850s, this pattern of allocation had shifted; most individual statutes provided for one vote per share.<sup>8</sup> The shift from individual incorporation statutes that imposed limitations on the voting power of large shareholders to individual incorporation statutes that mandated one vote per share can be located in the shifting of economic values in that period, the most pervasive of which was the facilitation and encouragement of private initiative.<sup>9</sup> Moving further in the direction of encouraging private initiative and change, general corporation statutes increasingly allowed corporations to vary the one vote per share allocation through their by-laws or articles of incorporation. In order to facilitate these new economic values, corporate law became increasingly more enabling in this period. The 1864 *An Act to authorize the granting of Charters of Incorporation to Manufacturing, Mining, and other Companies* provided for incorporation by letters patent issued under the seal of the governor general.<sup>10</sup> This Act stated that in default only of other express provisions in the by-laws of a company, at all general meetings of the company shareholders were entitled to as many votes as they held shares.<sup>11</sup> After Confederation, the general provisions of this Act were perpetuated in the companies acts of the federal government, and of the provinces of Quebec, Ontario, New Brunswick, Manitoba, Nova Scotia and Prince Edward Island.<sup>12</sup>

The provinces' corporation statutes of general application provided that in default of other express provisions, shareholders were entitled to as many votes as they held shares. The *Ontario Joint Stock Companies' Letters Patent Act* of 1874, for example, deviated from the one share/one vote rule, providing that at all general meetings of a corporation every shareholder was entitled to as many votes as he owned shares in the company, unless expressly provided otherwise by letters patent or by-laws

7. Risk, *supra* note 4 at 289. See, for example, *An Act to incorporate the Imperial Fire, Marine and Life Insurance Company*, S.P.C. 1855, c. 210, s. iv, which provided for weighted voting rights.

8. Risk, *supra* note 4 at 289.

9. R.C.B. Risk, "The Law and Economy in Mid-Nineteenth Century Ontario: A Perspective" in David H. Flaherty, ed., *Essays in the History of Canadian Law* (Toronto: University of Toronto Press for the Osgoode Society, 1981) 88 at 103.

10. P.C.S. 1864, c. 23, s. 1.

11. *Ibid.*, s. 5(5)(c).

12. F.W. Wegenast, *The Law of Canadian Companies* (Toronto: Burroughs and Company, 1931) at 22. For a general background regarding the history of corporate law statutes in Canada, see F.E. Labrie & E.E. Palmer, "The Pre-Confederation History of Corporations in Canada" in Jacob S. Ziegel, ed., *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) 33; Bruce Welling, *Corporate Law in Canada: The Governing Principles* (Toronto: Butterworths, 1984); and Wegenast. For a perspective from Nova Scotia, see Jonathan H. Davidson, "Industry and the Development of Company Law in Nineteenth-Century Nova Scotia" (1995) 15:2 N.S. Hist. Rev. 88.

of the corporation.<sup>13</sup> All types of dual class shares other than subordinate (restricted) voting shares could be issued in Ontario between 1874 and 1953, although corporation records indicate that few issued non-voting common shares during this time period.<sup>14</sup> In addition, legislation enacted by the federal government between 1869 and 1935 repeatedly enabled corporations, by making provisions in their incorporating documents, to deviate from the one share/one vote rule.<sup>15</sup>

One of the first corporations to adopt a non-voting share structure during this time period was Molson's Brewery Ltd. (Molson), which became a public corporation in 1945 and eyed expansion after the war. Molson implemented a dual class share structure in December 1949; the capital stock was subdivided on the basis of one class A share and one class B share for each common share held. Authorized capital consisted of 1,000,000 class A shares and 1,000,000 class B shares, of which 750,000 shares of each class were outstanding. The class A and B stocks shared equally in any distribution of assets in event of liquidation.<sup>16</sup> Class B shares held voting rights, while the class A shares were "in accordance with the then Departmental practice, non-voting unless and until no dividends were declared or paid there-on for two successive years."<sup>17</sup> The *Globe and Mail*

13. S.O. 1874, c. 35, s. 22. Quebec enacted *The Joint Stock Companies General Clauses Act* in 1868. Section 10 stated that in default of express provisions, shareholders would be entitled to as many votes as they held shares; S.Q. 1868, c. 24, s. 10(3). Nova Scotia and Manitoba's acts contained similar provisions: S.N.S. 1883, c. 24, s. 30; S.M. 1875, c. 28, s. xxii(3). *An Ordinance respecting Companies*, an act of the Northwest Territories (which would have applied to the areas covered by present-day Alberta and Saskatchewan), also indicated that in default of any exceptions as to voting, every shareholder was entitled to one vote per share: O.N.W.T. 1901, c. 20 s. 121. British Columbia adopted the English-model "memorandum and articles of association system" when it consolidated its corporate law in 1897. Similarly, the act stated that in default of any regulations as to voting, every member held one vote: *An Act for the Incorporation and Regulation of Joint Stock Companies and Trading Companies*, S.B.C. 1897, c. 2, s. 101. An exhaustive overview of all provincial statutes is beyond the scope of this article.

14. Jeffrey Kerbel, *Main Street to Bay Street: Restricted Shares Come to Ontario* (LL.M. Thesis, Harvard Law School, 1985) [unpublished] at 24 [Kerbel, *Main Street to Bay Street*].

15. See, for example the *Canada Joint Stock Companies Clauses Act*, S.C. 1869, c. 12, s. 11(3); *Companies Act*, S.C. 1935, c. 55, s. 16. Kerbel suggests that on first reading of the 1935 act, it would seem that restricted shares could be created, but given the fact that the incorporating authorities could refuse to issue letters patent if they did not approve of provisions in the corporation's charter, "this apparent freedom was largely illusory." Furthermore, Kerbel remarks that the Secretary of State, when introducing the legislation (in 1935) indicated that a by-law restricting voting rights would not be allowed. Upon analysis of the statute, however, Kerbel concludes that it appeared that a corporation's share structure could be manipulated so as to provide for the creation of a class of restricted shares: "The only inconvenience would be that the controlling group would have to hold two classes of shares and the right to vote triggered by some presumably impossible occurrence would have to be attached to the preferred shares." Kerbel, *Main Street to Bay Street*, *supra* note 14 at 29-33.

16. "Molson Inc." (8 March 2005), online: FPinformart.ca <<http://80-www.fpinformart.ca.ezproxy.library.yorku.ca/>>.

17. Submission of Kenneth A.F. Gates, Vice-President and General Counsel, The Molson Companies, to the Ontario Securities Commission (OSC) (31 August 1981).

carried a short notice on January 24, 1950, announcing that the new class A and class B shares had been approved for listing on the Montreal Stock Exchange (MSE).<sup>18</sup> The class A and class B shares were listed on the TSE in November 1958; that year the class A and B shares were subdivided on a two-for-one basis. The response to Molson's issue of dual class shares was positive,<sup>19</sup> consistent with the response to other corporations issuing dual class shares in that period.<sup>20</sup>

According to a document prepared by the Ontario Securities Commission (OSC), between 1953 and 1970, twenty-one companies listed non-voting shares on the TSE.<sup>21</sup> While some provinces introduced certain restrictions on dual class shares,<sup>22</sup> the default model was in place in both federal and provincial corporate law by this time. While public shareholders and employees did not appear to raise concerns with dual class shares until the 1980s, various federal and provincial committees considered the legality of dual class shares as business corporations statutes underwent revisions in this period.

In 1967, the Interim Report of the Ontario Select Committee on Company Law was released (the Lawrence Report).<sup>23</sup> The report questioned whether a corporation should be permitted to issue common shares, which carried no votes; none of the briefs submitted to the committee had advocated the adoption of a voteless common share. The committee did indicate, however, that the corporation statutes of most provinces permitted the issuance of such shares, and there was no evidence of abuse or impropriety in the practice. The report ultimately recommended against the adoption of voteless common shares, reasoning that the concept of such a share was contrary to the principles of corporate law, which envisioned

18. "List New Molson Shares" *Globe and Mail* (24 January 1950) 20.

19. MacNab's Portfolio, "Accepts Molson's Offer" *Financial Post* (15 November 1958) 19.

20. "Investors Rush for Stock In New Steinberg's Issue" *Financial Post* (22 November 1958) 5.

21. TSE Submission, *supra* note 2, Appendix D.

22. For example, Ontario's *Corporations Act* of 1953 appeared to be less flexible than its predecessor statute: S.O. 1953, c. 19. Jeffrey Kerbel suggests that the intent of the Ontario statute from 1953 to 1970 appears to have been to prohibit the issuance of all restricted shares, although it was probably relatively easy to circumvent the provision. Section 29 of the statute provided that every holder of preference or common shares issued after April 30, 1954, was entitled to one vote at all meetings of the corporation for every share held, although subsection 27(2) allowed preference shares to contain conditions, restrictions, limitations or prohibitions on the right to vote: Kerbel, *supra* note 14 at 25. One commentator indicated that between 1953 and 1971, non-voting shares were only permitted in Ontario if they were preference shares. There had to be some preference to offset the loss of the vote, although in practice the preference could be minuscule: Kerbel, *supra* note 14. Not all provinces' legislation carried such restrictions on the ability to issue non-voting or subordinate voting shares: Quebec's *Companies Act*, for example, permitted corporations to issue shares of more than one class, mandating that each share of any series of the same class carry the same right to vote, or the same conditions and limitations respecting the right to vote. R.S.Q. 1964, c. 271, s. 45(1) and 45(3).

23. Ontario, Legislative Assembly, *Interim Report of the Select Committee on Company Law* (Toronto: Queen's Printer, 1967) (President: Allan Lawrence).

that equity shareholders exercise ultimate control over management, and that the usefulness of such shares had not been proven.<sup>24</sup> Ontario's *Business Corporations Act* of 1970, however, rejected the committee's recommendations. The Act provided for two types of shares: common and special.<sup>25</sup> Where a corporation had more than one class of shares, one class was required to be common shares; other classes of shares, deemed "special shares," could have attached to them any designations, preferences, rights, conditions, restrictions or limitations as set out in the articles.<sup>26</sup> Section 28 of the Act mandated equality among shares of a class.<sup>27</sup> Corporations could issue one or more classes of special shares, provided they had one class of common shares outstanding.

Similarly, the issue of shares carrying differential voting rights surfaced when a new corporation statute for Canada was drafted. In 1971, the authors of *Proposals for a New Business Corporation Law for Canada* indicated that although the draft act mentioned only "shares," shares could be of different classes with different terms and conditions attached to them.<sup>28</sup> At least one class of shares in every corporation was required to hold unrestricted voting rights. In the authors' view, the prospective shareholder should be able to decide whether he wished to purchase shares that did not carry a right to vote: "If, knowing the circumstances, he elects to buy such shares, there seems to be no compelling reason why the law should prevent him from doing so."<sup>29</sup> The authors added, however, that protection should be granted to shareholders in situations where their rights may change: "The law should ensure, however, that the shareholder is given a voice on any proposal that is made to change his rights subsequently, and a chance, if he disagrees with the proposal, to withdraw from the corporation."<sup>30</sup> The suggestions of the authors were followed and implemented in the 1974 Act: corporations could issue different classes of shares, although one class of shares was required to have full voting rights.<sup>31</sup>

24. *Ibid.* at 31-33.

25. S.O. 1970, c. 53, s. 26(2) and (3).

26. *Ibid.*, s. 26(3) and s. 27(1).

27. *Ibid.*, s. 28. Other provinces, around this time period, did not make the distinction between common and special shares. Quebec's act, for example, allowed for the creation of shares of more than one class, but mandated that each share of any series of the same class carry the same right to vote: R.S.Q. 1964, c. 271, s. 45(3); R.S.Q. 1977, c. C-38, s. 48(3).

28. Robert W.V. Dickerson, John L. Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971) at 9.

29. *Ibid.*

30. *Ibid.*

31. *Canada Business Corporations Act*, S.C. 1974, c. 33, s. 24(3) and (4).

Provincial statutes followed the course of the federal act. When Alberta's business corporations act was revised in 1981, commentators reiterated that if a corporation held one class of shares, the shares should hold equal rights to vote, receive dividends and share property upon dissolution. They asserted, however, that corporations should have the ability to issue different classes of shares with different rights and restrictions.<sup>32</sup> Alberta's revised act, passed in 1981, stated that where a corporation had only one class of shares, the rights of the holders were deemed equal and included the right to vote at all meetings of shareholders.<sup>33</sup> Ontario's statute, which was revised in 1982, carried a similar provision.<sup>34</sup> Articles of incorporation could provide for more than one class of shares, providing the articles laid out the rights, privileges, restrictions, and conditions attached to such shares.<sup>35</sup> The Act eliminated the classification of shares into common and special shares.

Thus, the Canadian corporate law regime at the beginning of the twentieth century affirmed the default common law rule of one vote per share, although allowing express deviations from the rule. By the end of the century, the 1975 *Canadian Business Corporations Act* and various provincial statutes similarly stipulated that unless the articles otherwise provided, each share of a corporation entitled its holder at a meeting of shareholders to one vote.

Within the securities law framework, the use of dual classes of shares gained additional significance with the amendments to Ontario's *Securities Act* in 1978. In the event of a takeover where shares were acquired at a premium over market value, part XIX of the Act required that a follow-up offer be made to the shareholders who held shares of the class for which the original take-over bid was made.<sup>36</sup> As such, holders of non-voting or subordinate voting shares could be left out of any premium if an offer was only made for a corporation's voting shares. Some members of the investment community predicted an increase in the number of stock splits into voting and non-voting shares due to this amendment, combined with

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32. *Proposals for a New Business Corporations Law for Alberta* (Edmonton: Institute of Law Research and Reform, 1980) at 75.

33. *Business Corporations Act*, S.A. 1981, c. B-15, s. 134(1).

34. *Ontario Business Corporations Act*, S.O. 1982, c. 4, s. 22(2).

35. *Ibid.*, s. 22(4).

36. S.O. 1978, c. 47, s. 88(1) and s. 91(1). See Mary Condon, *Making Disclosure: Ideas and Interests in Ontario Securities Regulation* (Toronto: University of Toronto Press, 1998) at 211-212 for a discussion of the inclusion of this provision in the final act.

the increasing vulnerability widely-held corporations experienced with respect to takeovers.<sup>37</sup>

Ontario's "follow-up" offer provision was unique: Alberta's revised *Securities Act* of 1981, for example, specifically exempted agreements with up to 15 security holders from the provisions of the act, permitting premiums to be offered for control blocks without requiring that the same offer be made to minority shareholders.<sup>38</sup> Although the rest of the act remained similar to Ontario's statute, some analysts predicted that the difference could translate into more business for the Alberta exchange.<sup>39</sup> Similarly, Quebec's Act did not require a follow-up offer.<sup>40</sup> The issue raised eyebrows when Télé-Capital Ltée. was taken over by La Verendrye Management Corp. in 1979: La Verendrye offered three times as much for Télé Capital's voting shares as the non-voting shares (the latter of which were held by the public), in an agreement with two of the three principal holders of the voting shares.<sup>41</sup>

## 2. *Dual class shares and the concentration of corporate ownership in Canada*

Within an enabling legislative framework, corporations were able to implement dual class share structures as a means to raise equity capital. From the 1940s to the 1960s, the main impetus for corporations to adopt a dual class share structure was to maintain the control position of the majority shareholders while at the same time accessing public capital markets. Non-voting shares were also used to reward or motivate employees through employee stock ownership plans. During this period, by instilling a sense of ownership in public shareholders more generally and employees in particular and by reminding these corporate stakeholders of the value of family-controlled corporations, concerns surrounding the impact of dual class shares on corporate performance and democratic values were not raised by corporate stakeholders. This was due in large part to the fact that there were only a few corporations employing a dual class share structure in this period and such a structure merely appeared to be a logical extension to the fact that historically and presently, the

37. Gillian MacKay "Splits to voting, non-voting shares unfair to minority" *Globe and Mail* (25 February 1980) B1. The number of takeover bids in Canada had increased dramatically prior to the introduction of the act. Victor P. Alboini, *Ontario Securities Law* (Toronto: Richard De Boo, 1980) at 626.

38. S.A. 1981, c. S-6.1, s. 132. See also David Stewart-Patterson "ASE ready for further growth in better climate" *Globe and Mail* (21 September 1981) B31.

39. "ASE ready for further growth in better climate," *ibid.*

40. *Securities Act*, R.S.Q. 1977, c. V-1, ss. 131-156.

41. "Splits to voting, non-voting shares unfair to minority," *supra* note 37. See also Ian Rodger "Offer for Tele-Capital shares being opposed" *Globe and Mail* (21 August 1979).

ownership structure of Canadian corporations has been concentrated rather than widely held. Situated in this context, the 1978 Royal Commission on Corporate Concentration concluded that the use of non-voting and multiple voting stock was not a danger to the investing public, “[i]f minority and institutional shareholders have confidence in the management and in the controlling interest and wish to acquire non-voting equity stock, they are frequently able to so at a price substantially below that of voting stock.”<sup>42</sup>

A surprisingly limited voice on dual class share structures in the Canadian context for the period from 1940 to 1990, was that of economists. A review of general economics and corporate finance texts did not surface specific discussion regarding dual classes of shares.<sup>43</sup> Similarly, a search of the indices of the *Financial Post* from 1975 to 1990 yielded no commentary specific to dual class shares by economists. There exists considerable literature, however, within the American context.<sup>44</sup> One notable Canadian exception is economist Elizabeth Maynes, who in 1988 completed a doctoral thesis on restricted shares in Canada, 1970-1985. Maynes identified various motivations for creating a class of restricted shares: increased liquidity, achieving or maintaining Canadian control, and the maintenance of the current distribution of voting rights.<sup>45</sup> Maynes’ analysis of fifty-five share reorganizations during the period of study concluded that shareholders’ wealth was not increased by the reallocation of voting rights.<sup>46</sup> Looking to the period from 1980 to 1984, when the OSC reviewed its policy with regard to dual class share structures, Maynes concluded that the OSC’s policy announcements affected the value of shares. The threat to de-list inferior voting shares appears to have hurt the inferior voting shares more than the superior shares, and the lack of clarity regarding the OSC’s intentions seems to have created confusion in the market place.<sup>47</sup>

42. *Report of the Royal Commission on Corporate Concentration* (Ottawa: Minister of Supply and Services, 1978) at 291.

43. See, e.g., Lawrence H. Officer, ed., *Canadian Economic Problems and Policies* (Toronto: McGraw-Hill, 1970); William C. Hood, *Financing of Economic Activity in Canada* (Ottawa: Queen’s Printer, 1959).

44. See, e.g., W.H.S. Stevens, “Stockholders’ Voting Rights and the Centralization of Voting Control,” (1926) 40 *Quarterly J. of Econ.* 353; William Ripley, *Main Street and Wall Street* (New York: Little, Brown, and Co., 1927); W.H.S. Stevens, “Voting Rights of Capital Stock and Shareholders” (1938) 11 *J. Bus.* 311; Michael Jensen & William Meckling, “Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure” (1976) 3 *J. Finan. Econ.* 305; Marcia Millon Cornett & Michael R. Vetsuypens, “Voting Rights and Shareholder Wealth: The Issuance of Limited Voting Stock” (1989) 10 *Managerial Dec. Econ.* 175.

45. Elizabeth M. Maynes, *An Analysis of Restricted Shares in Canada, 1970-1984* (PhD Dissertation, Queen’s University, 1988) [unpublished] at 15-22.

46. *Ibid.* at 97.

47. *Ibid.* at 161.

Economists in this period were more focused on the concentration of corporate ownership in Canada. Randall Morck et al. indicate that at the beginning of the twentieth century, large pyramidal corporate groups, controlled by wealthy families or individuals, dominated Canada's corporate sector. By mid-century, although the corporate sector encompassed widely held firms, pyramidal family groups were on the rise after World War II.<sup>48</sup> In 1984, for example, nine families or individuals owned shares with a market value of more than \$9 billion, out of a total index of about \$89 billion.<sup>49</sup> In 1990, fourteen per cent of companies listed on the TSE were widely held, in comparison to sixty-three per cent of those listed on the U.S. Fortune 500.<sup>50</sup>

After World War II, in an era of reconstruction and strong economic growth, pyramidal family groups were on the rise. The Sobey and Steinberg families built groups in land development and food retailing. The Simard, Desmarais, and Basset families grew corporate groups in Quebec, while the Irving, Billes, Thompson, and Bronfman families all flourished in the war's aftermath.<sup>51</sup> E.P. Taylor's Argus Group also grew quickly, acquiring control of forestry and broadcasting firms. The late 1960s witnessed a "flurry" of control block acquisitions by both new and old pyramidal groups.<sup>52</sup> Several of these family groups implemented dual class share structures during the 1950s and 1960s. Steinberg Inc. issued non-voting shares in 1958; the Billes' Canadian Tire, in 1960; Argus Corp., in 1962; and Sobey's, in 1966. In many of these cases, demand for shares far exceeded share issues. For example, when Steinberg issued Class A non-voting shares demand far exceeded the share offering.<sup>53</sup>

The quarter-century following World War II witnessed rapid economic growth and expansion. Dual class equity represented a means by which closely held or family-controlled corporations could participate in expansion without relinquishing control. For example, Rolland Inc., a paper manufacturing business, listed non-voting shares on the MSE in 1956, and on the TSE in 1961; the issue of class A non-voting shares permitted

48. Randall Morck et al., "The Rise and Fall of the Widely Held Firm: A History of Corporate Ownership in Canada" (July 2004), online: National Bureau of Economic Research <<http://www.nber.org/papers/w10635>>.

49. Dan Westell "Big chunk of business in hands of few" *Globe and Mail* (25 August 1984) B1.

50. R. Daniels & P. Halpern, "Too close for comfort: The role of the closely held public corporation in the Canadian economy and the implications for public policy" (1995-96) 26 Can. Bus. L.J. 11 at 12.

51. Morck et al. summarize the rise of these family groups, *supra* note 48 at 29. See also Michael Bliss, *Northern Enterprise Five Centuries of Canadian Business* (Toronto: McClelland and Stewart, 1987) at 465-469.

52. Morck et al., *supra* note 48.

53. "Investors Rush for Stock In New Steinberg's Issue" *Financial Post* (22 November 1958) 5.

the company to raise equity to expand, while maintaining control in the hands of the Rolland family.<sup>54</sup> United Auto Parts Ltd. (UAP), a wholesale distributor of auto parts and accessories and founded by the Prefontaine family in 1926, issued two classes of shares in 1966. Similarly, UAP explained that its share structure allowed it to raise the capital necessary to expand throughout Canada, while remaining a family-controlled enterprise.<sup>55</sup> Both Roland and UAP put forward these explanations only in the 1980s, when the use of dual class shares was challenged, not at the time that the non-voting shares were issued and faced no resistance.<sup>56</sup>

By the 1960s, dual class share structures were increasingly used to enable employees to participate in the growth of corporations, without diluting the control position of the majority shareholders. This use for non-voting shares was consistent with the growth of private pension plans in this period. While organized labour played a role in the push for pensions a record does not exist documenting involvement by unions with regard to the use of non-voting shares in this period. Mid-century, the debate centred around whether government or private business should bear the responsibility for funding pensions. Employers had operated various security schemes prior to 1950, and the *Financial Post* reported an "enormous" growth in corporate pension plans from 1940 to 1950.<sup>57</sup> Approximately one in five working Canadians had some protection against old age, funded either through employers, insurance plans or federal old-age pensions.<sup>58</sup> The president of Simpsons Ltd., Edgar Burton, suggested that businessmen could choose between a socialist welfare state or meeting these new responsibilities themselves. He argued, "Welfare enterprise should not be approached by businessmen grudgingly, or as charity with no return. But it should be undertaken positively—the best investment in the world."<sup>59</sup> Increasing pressure to implement social security benefits at this time can be attributed to several factors: the increasing difficulty, particularly among lower-income groups, to save for retirement; the growing proportion of older people in the population; the increase in life expectancy; and the shifting nature of the work force from agrarian self-employment to working for others.<sup>60</sup>

54. Submission of Rolland Inc. to the OSC (1 September 1981) at 5.

55. Submission of UAP Inc. to the OSC (8 September 1981) at 5.

56. *Ibid.*

57. Ronald Williams "Unions Fighting to Get Into Driver's Seat" *The Financial Post* (24 December 1949) 1. According to a study quoted in the *Post*, from 1919 to 1937, 711 companies reported pension benefit schemes, while from 1938 to 1947, 2,533 companies had adopted pension plans.

58. *Ibid.* at 12.

59. *Ibid.* at 1.

60. *Ibid.* at 12.

Organized labour led the push for pension benefits, targeting the automobile, steel, and rubber industries in 1950. Unions argued that pensions should be subject to union-management negotiations after the United States Supreme Court had ruled to this effect. During the decade from 1940 to 1950, the *Financial Post* reported that there had been a 250% increase in the number of Canadian workers in organized labour unions.<sup>61</sup> While targeting industry, the ultimate goal of the unions' campaign, the *Post* reported, was a government-run social security scheme "from cradle to grave."<sup>62</sup> Unions also hoped to raise the profile of organized labour by successfully negotiating pension benefits for Canadian workers. The Canadian Congress of Labour stated in a memorandum that "[s]ince employers tend to introduce pension and health plans in order to stave off union organization or to draw their employees' loyalty away from the union to themselves, it becomes doubly important that the role of the union in elaborating, demanding and negotiating for these demands be clearly established...."<sup>63</sup> Although at first supporting contributory pensions, organized labour began to push for non-contributory pensions with government or corporations bearing the full cost.<sup>64</sup> In the U.S., Ford had agreed to pay non-contributory pension benefits, spurring unions in Canada to demand the same from employers.

The president of Simpsons Ltd., Edgar Burton, suggested that providing for the long-term security of employees was part and parcel of emerging economic values: "it seems clear to me that businessmen must decide very soon whether they want a welfare state such as the Socialists advocate, and which can lead only to dictatorial power in the hands of a few, or whether businessmen large and small will meet these new responsibilities."<sup>65</sup> Dual class shares were used by corporations in this period to meet these new responsibilities. Canadian Tire Corp. (Canadian Tire), for example, implemented two classes of shares in 1960. John Billes had opened the company's first retail store in Toronto in 1922, soon joined by his brother A.J. Billes in ownership and management. In July of 1960, the common shares of the company were split into two class A non-voting shares and two voting shares. At the time of the stock split, A.J. Billes reported that the class A shares would "permit employees to become partners in the enterprise." He reasoned, "We think an employee's extra effort should

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61. *Ibid.* at 1.

62. *Ibid.*

63. *Ibid.*

64. *Ibid.* at 12. Of 3589 industrial pension plans in 1947, 2895 were financed jointly by the employer and employee, 604 were financed solely by employers, and eighteen solely by employees.

65. *Ibid.* at 1.

be interpolated into long-range financial reward.”<sup>66</sup> Toward this end, Canadian Tire had commenced selling common shares to its employees under a profit-sharing plan in 1958. By 1960, employees owned twelve per cent of the company; after the stock split, the company offered class A shares to its employees. One author has suggested that A.J. Billes’s insecurity regarding control led to the issuance of non-voting shares.<sup>67</sup>

Similarly, other corporations issued non-voting shares as a means to instill a sense of ownership in employees, without relinquishing control. Simpsons-Sears Limited, whose share structure consisted of class A, B, and C shares, adopted this share structure when Simpsons-Sears was incorporated in 1952, to provide for equality of control of founding shareholders Simpsons and Sears-Roebuck. The class A non-voting shares were originally designed as shares which could be issued to employees, allocated as part of profit-sharing plans.<sup>68</sup> In 1975, Magna International Inc. (Magna) introduced an employee profit-sharing plan to foster employee participation in share ownership and profits.<sup>69</sup> Frank Stronach indicated that the company kept its wages low to remain competitive, but “if the company does well, we share it through our equity participation program.”<sup>70</sup> All employees were members of the plan, which invested exclusively in the class A and class B shares of the company.<sup>71</sup> On retirement, an employee expected to receive the equivalent of the market value of the Magna shares held for the employee by the plan.<sup>72</sup>

In the quarter-century after World War II, dual class equity represented a means by which closely held or family-controlled corporations could participate in expansion and meet their new corporate responsibilities for their employees in retirement without relinquishing control. This period created the conditions for events that would transpire in the 1980s, when the value of family control protected by dual class shares first began to be cast in doubt by employees and shareholders. The issues surrounding the private benefits of control associated with dual class shares would take on additional significance because non-voting shares were issued as

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66. “Split Stock, Up Dividend Fivefold” *Globe and Mail* (1 July 1960) 19.

67. Ian Brown, *Freewheeling: The Feuds, Broods, and Outrageous Fortunes of the Billes Family and Canada’s Favourite Company* (Toronto: Harper Collins, 1989) at 129.

68. Hudson’s Bay Co. acquired the majority of class B shares from Simpsons in 1979. Submission by R. Sharpe (on behalf of Simpsons-Sears Limited) to the OSC (31 August 1981) at 2.

69. Submission by J. Brian Colburn, Vice-President and General Counsel, Magna International, to the OSC (13 April 1984) at 2 [Magna Submission].

70. Eric Evans “Small ends up big in Magna empire” *Financial Post* (22 October 1983) 17.

71. Magna Submission, *supra* note 69. Class A shares of Magna carried one vote each, while class B shares carried 500 votes each. Stronach and members of management owned the majority of class B shares: “Magna International Inc.” (November 1984) TSE Review.

72. Magna Submission, *supra* note 69.

a means to instill a sense of ownership among corporations' employees. By the 1980s, employees, like other shareholders, would begin to think of themselves as owners; the convergence of interests and concerns of employees and other non-voting shareholders was highlighted in scenarios like that of the Canadian Tire bid, that will be discussed. It was also just before this period, in the 1970s, that the use of dual class shares began to proliferate. It was at this juncture that nationalist policy, legislation, and discourse took on a key legitimizing function.

### 3. *Dual class shares and the impact of foreign investment review measures*

Beginning in the 1970s, while control remained a central reason for corporations to utilize non-voting or subordinate voting shares, government policy and legislative intervention directed at curtailing foreign investment in the Canadian economy was increasingly used to justify the use of dual classes of shares, as they began to face resistance by regulators, and later shareholders and employees. This period of government intervention relating to foreign investment began in the 1960s. Foreign investment had increased steadily in Canada from 1900 to 1950. Although historically foreign investment had been essential to Canada's economic development, the character of foreign investment changed during the first half of the twentieth century. The proportion of American investment in Canada grew from 13.6 per cent in 1900, to 75.5 per cent in 1950, accompanied by a decline in British investment.<sup>73</sup> A substantial amount of American capital coming into Canada took the form of direct investment, and foreign investment was concentrated in certain areas of the Canadian economy, such as manufacturing, mining, and petroleum.<sup>74</sup>

Foreign domination of Canadian industry and resources began to receive increasing public attention by the 1960s.<sup>75</sup> In 1956-57, Walter Gordon, a businessman with strong ties to the Liberal Party, chaired the Royal Commission on Canada's Economic Prospects. During the course of the commission's hearings, Gordon noted that Canadians expressed fear regarding the consequences of foreign control, equating foreign domination of the economy with loss of political independence.<sup>76</sup> The report's recommendations focused on ensuring increased access to

73. Michael Bliss, "Founding FIRA: The Historical Background" in James M. Spence & William P. Rosenfeld, eds., *Foreign Investment Review Law in Canada* (Toronto: Butterworths, 1984) 1 at 2.

74. *Ibid.*

75. Robert A. Donaldson, "Foreign Investment Review and Canadianization" in *Corporate Law in the 80s: Special Lectures of the Law Society of Upper Canada* (Don Mills: De Boo, 1982) 461 at 472-473.

76. *Royal Commission on Canada's Economic Prospects, Final Report* (Ottawa: Queen's Printer, 1957) at 390.

Canadian jobs and research opportunities, greater corporate disclosure by American-controlled firms, and increased Canadian participation in the corporations' decision-making and shareholdings.<sup>77</sup> Although the Diefenbaker government did not act on Gordon's report, the report did influence the public's perception regarding the impact of foreign investment in Canada and injected the issue permanently into Canadian politics.<sup>78</sup>

The 1960s ushered in increased Canadian nationalism and anti-Americanism, spurred in part by Canada's bi-centennial celebrations and growing criticism of American involvement in the Vietnam War. In 1967, Gordon, as a minister without portfolio in the Pearson cabinet, established a special task force on the structure of Canadian industry, chaired by Melville H. Watkins. Watkins, like Gordon, perceived American interests as fundamentally antagonistic to Canadian interests.<sup>79</sup> The report of the task force, *Foreign Ownership and the Structure of Canadian Industry*, outlined both the advantages and drawbacks of foreign investment in Canada, ultimately recommending that more information be obtained regarding the activities of multinational corporations, greater regulation and taxation of such firms, and the establishment of an investment trust called the Canadian Development Corporation to help limit foreign takeovers.<sup>80</sup>

By the late 1960s and early 1970s, media publicity of American takeovers of Canadian companies stimulated concern regarding foreign investment, which translated into popular fears that the country was being sold out to Americans.<sup>81</sup> These fears had increased, despite evidence that Canada's dependence on foreign investment was actually beginning to decline.<sup>82</sup> Yet another study into foreign investment, led by Herb Gray and entitled *Foreign Direct Investment in Canada*, was published in 1972.<sup>83</sup> Gray characterized foreign investment as a complex mix of costs and benefits; he advocated that any policies established to address the problem should aim to reduce such costs and maximize benefits to Canadians.<sup>84</sup>

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77. *Ibid.* at 393.

78. Bliss, *supra* note 51 at 3-4.

79. Robert Bothwell, Ian Drummond & John English, *Canada Since 1945: Power, Politics, and Provincialism* (Toronto: University of Toronto Press, 1989) at 307.

80. *Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canadian Industry* (Ottawa: Queen's Printer, 1968). See also Bothwell *et al.*, *ibid.* at 308.

81. Bliss, *supra* note 51 at 7.

82. Bliss, *supra* note 51. See also table, "US Direct Investment in Canadian Industry 1929-1977" in Graham D. Taylor & Peter A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994) at 452.

83. *Foreign Direct Investment in Canada* (Ottawa: Information Canada, 1972).

84. *Ibid.* at 7.

The report's chief recommendation was the establishment of a review agency to oversee and regulate foreign direct investment in Canada.

In response to Gray's report, the federal government passed the *Foreign Investment Review Act* at the end of 1973.<sup>85</sup> The Act provided for the creation of the Foreign Investment Review Agency (FIRA) to advise and assist in the administration of the Act. Under the Act, any acquisition of control over a Canadian business by "non-eligible" persons<sup>86</sup> was subject to a review process. Similarly, direct foreign investment in new enterprises and the expansion of an existing foreign business into new or unrelated areas were also subject to screening. To receive government approval to establish a new business or acquire a Canadian business, foreign investors were required to file a notice with FIRA and demonstrate that their proposed transactions were likely to be of significant benefit to Canada, based on criteria set forth in section 2(2) of the Act.<sup>87</sup> The criteria were subjective, allowing the federal government to address proposals on a case-by-case basis.

FIRA prompted firms to become "Canadian" to avoid scrutiny under the Act, or boost their Canadian status: one method of accomplishing this was through a stock reorganization that introduced dual class equity. The Alberta firm Sulpetro Limited, for example, asserted that it introduced its dual class share structure mainly to preserve its status as an eligible corporation for the purposes of FIRA, and to accommodate foreign investors who wished to continue to invest in Sulpetro.<sup>88</sup> One lawyer advised that the best way for foreign-controlled persons to become "Canadianized" (and thereby avoiding the Act's provisions) was to convert their controlling shares into some form of non-voting shares, allowing them full rights to participate in dividends and upon winding up, while clearly demonstrating to the agency that they no longer retained control over the corporation.<sup>89</sup>

In the same vein as FIRA, throughout the 1960s and early 1970s governments passed various amendments to legislation aimed at regulating "key sectors" of the Canadian economy, requiring a minimum level of

85. S.C. 1973-74, c. 46. The Act came into force in part on April 9, 1974. The remaining part of the Act came into effect on October 15, 1975. For an overview of the Act, see James M. Spence, "The Foreign Investment Review Act: An Overview" in James M. Spence & William P. Rosenfeld, eds., *supra* note 73, 13.

86. Non-eligible persons were defined by s. 3(1) of the Act and included foreign individuals, foreign sovereigns and corporations controlled by such persons.

87. Spence, *supra* note 85.

88. Submission by Stanley Carscallen (counsel for Sulpetro Limited) to the OSC (31 August 1981) at 4. See also Anthony McCallum "Main backers agree to Sulpetro plan" *Globe and Mail* (5 October 1981) B1, which also states that Sulpetro limited voting rights in 1976 to create a Canadian-controlled company in the eyes of FIRA.

89. Peter Hayden, "Go Canadian and Avoid FIRA" *CA Magazine* 108:2 (February 1976) 36 at 39.

Canadian directors and Canadian ownership in corporations carrying on business in these sectors.<sup>90</sup> Generally, the amendments required that seventy-five per cent of directors be Canadian citizens ordinarily resident in Canada, non-resident shareholdings be restricted to twenty-five per cent of the outstanding voting shares, and in the case of a single non-resident shareholder, holdings be restricted to ten per cent of the outstanding voting shares.<sup>91</sup> Amendments to the *Income Tax Act* were made to help generate a greater degree of Canadian ownership of voting shares by reducing the amount of withholding tax for corporations with a greater degree of Canadian control (at least twenty-five per cent).<sup>92</sup> The Act also established restrictions on the outward flow of investment, penalizing investment portfolios that exceeded ten per cent of their value in foreign assets.<sup>93</sup>

Both broadcasting and energy were identified as key sectors of the Canadian economy. Since the 1920s, Canadian broadcasting policy has been connected with cultural sovereignty, national unity, and fear of American control over Canadian broadcasting.<sup>94</sup> Various royal commissions examined Canada's broadcasting policy, but it was not until the 1950s that the federal government introduced express limits on foreign ownership. In 1956, the Department of Transport endorsed a proposal to limit foreign investment to twenty per cent.<sup>95</sup> The first formal restrictions on foreign investment came with the passage of the 1958 *Broadcasting Act*, which limited foreign ownership to twenty-five per cent of the voting shares of a broadcasting undertaking.<sup>96</sup> The 1968 Act gave the Governor General in Council power to issue directives to the newly formed Canadian Radio-Television Commission (CRTC) with respect to whom broadcasting

90. Donaldson, *supra* note 75 at 473.

91. Donaldson, *supra* note 75. See, for example, the *Bank Act*, S.C. 1966-67, c. 87, ss. 10(4), 18(3), 20(2) and ss. 52-56; *Canadian and British Insurance Companies Act*, S.C. 1957-58, c. 11, s. 3; *Loan Companies Act*, S.C. 1964-65, c. 40, s. 38; *Trust Companies Act*, S.C. 1964-65, c. 40, s. 30; and *Investment Companies Act*, S.C. 1970-71-72, c. 33, ss. 10-15.

92. *Income Tax Act*, S.C. 1964-65, c. 13, s. 206. For an overview of legislative amendments aimed at curtailing foreign ownership, see Foreign Investment Division, Office of Economics, Department of Industry, Trade and Commerce, *Selected Readings in Laws and Regulations Affecting Foreign Investment in Canada* (various years). See also Donaldson, *supra* note 75 at 551-565.

93. S.C., 1970-71-72, c. 63, s. 206. This was amended to provide for a 20 per cent limit in 1991: S.C. 1991, c. 49, s. 166.

94. In a 1932 address to Parliament, Prime Minister R.B. Bennett encapsulated Canadian broadcasting policy with the following statement: "The enormous benefits of an adequate scheme of radio broadcasting controlled and operated by Canadians are abundantly plain. Property employed radio can be a most effective instrument in nation-building." As quoted in Monique LaFontaine, *Foreign Ownership, Television Broadcasting and Canadian Culture: an Appeal for Increased Liberalization of the Foreign Ownership Restrictions* (L.L.M. Thesis, York University, 1999) [unpublished] at 50.

95. Jeffrey Kowall, "Foreign Investment Restrictions in Canadian Television Broadcasting" (1992) 50 U.T. Fac. L. Rev. 61 at 69.

96. *Ibid.* at 72-73.

licences could be issued, based on Canadian ownership.<sup>97</sup> The first CRTC directive, which came into effect on September 20, 1968, limited the issue of broadcasting licences to Canadian citizens or "eligible Canadian corporations," whose chairperson and directors were Canadian citizens. The directive required that eighty per cent of shares with full voting rights and paid-up capital be beneficially owned by Canadians or Canadian corporations.<sup>98</sup>

In response to this regulatory intervention, several broadcasting companies began to adopt dual class share structures in order to comply with the foreign investment restrictions while at the same time enabling them to raise equity capital. For example, Selkirk Communications Ltd., which became a publicly incorporated corporation in June 1959, listed non-voting class A shares on the TSE in December of that year.<sup>99</sup> The company indicated that this share structure was designed to meet the specific concerns of, and was adopted with the approval of, the Federal Department of Transport and the Board of Broadcast Governors (as the share reorganization was undertaken prior to the creation of the CRTC).<sup>100</sup> Citing the need to raise and access capital, the company concluded that the capital structure of Selkirk "assure[d] it of compliance with the CRTC Direction while at the same time it permit[ted] public ownership of its securities."<sup>101</sup> CHUM Ltd. (CHUM) listed non-voting shares on the TSE in December 1969. Similarly, CHUM's president Allan Waters indicated that the company adopted class B non-voting shares in order to comply with the CRTC directive and demonstrate Canadian control of its broadcasting properties.<sup>102</sup>

Numerous other broadcasting companies adopted dual class share structures over the next two decades: Canadian Cablesystems Ltd., Baton Broadcasting Inc., Astral Bellevue Pathe Ltd. and Shaw Communications Inc. (then known as Capital Cable TV Ltd.), to name a few.<sup>103</sup> The *Globe*

97. S.C. 1967-68, c. 25, ss. 2(6), 7(1), 22(1) and 27(1). For an overview of Canadian broadcasting policy, see Lafontaine, *supra* note 94, and Kowall, *supra* note 95.

98. Kowall, *supra* note 95 at 72.

99. Submission by F.T. Nash, Vice-President, Selkirk Communications Limited, to the OSC (27 August 1981) at 2.

100. *Ibid.*

101. *Ibid.* at 3.

102. Submission by Allan Waters, President, CHUM Limited, to the OSC (15 December 1980).

103. In July 1977, the existing common shares of Canadian Cablesystems were reclassified as class A common shares and new class B common shares were created. Baton Broadcasting, owned by the John Bassett family, adopted a share structure consisting of class A non-voting and class B voting shares in 1981. Astral Bellevue Pathe Inc. effected a share reorganization at a meeting of its shareholders on January 6, 1984, whereby its common shares were reclassified into (class B) subordinate voting and (class A) non-voting shares. Capital Cable TV undertook a three-for-one split of its common shares on January 12, 1982.

and *Mail* reported that in December 1980, Canadian Cablesystems delisted its class A voting shares from the U.S. market to encourage non-Canadians to invest in non-voting class B shares and to ensure compliance with Canadian law.<sup>104</sup> Acquired by Ted Rogers in 1979, the company changed its name to Rogers Cablesystems in 1981 to "more accurately reflect the continental nature of the company," a change that was prompted by the company's marketing thrust in the United States and a fight for a Minneapolis cable franchise.<sup>105</sup> In 1980, Ted Rogers and his family owned fifty-one per cent of the company's class A and 35 per cent of the class B shares.<sup>106</sup> Similarly, Rogers claimed that the company instituted the share structure to enhance its ability to raise equity capital while complying with the CRTC directive.<sup>107</sup> As a result of this legislative intervention, corporations with dual class share structures continue to be concentrated in communications industries in the current context.

Energy, like broadcasting, was also singled out as a key sector of the Canadian economy, precipitating regulatory intervention. Government policy with respect to oil and gas exploration and development culminated in the National Energy Program (NEP). Energy crises of the 1970s had sparked policy intervention in the oil and gas industry: in 1973, an OPEC oil embargo increased the price of oil fourfold, and in 1979-80, world oil prices doubled.<sup>108</sup> After Joe Clark's short-lived Conservative government was defeated, the new Liberal government under Pierre Trudeau announced the NEP as part of its budget speech on October 28, 1980. The goals of the program included security of supply, opportunity and fairness, to be attained by achieving fifty per cent Canadian ownership of oil and gas production by 1990, Canadian control of a significant number of oil and gas firms, and an increase in the federal share of oil and gas revenues through made-in-Canada prices and new taxes on producers.<sup>109</sup> The legislative foundation of the plan consisted of *Petroleum Incentive Payments Act* and the *Canadian Ownership and Control Determination Act*.<sup>110</sup>

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104. Jane Davidson "Canadian Cablesystems delists class A shares from U.S. market" *Globe and Mail* (7 January 1981) B5.

105. *Ibid.*

106. Submission by E.S. Rogers, Rogers Cablesystems Inc., to the OSC (13 April 1984).

107. *Ibid.*

108. For a short summary of the energy crises and government intervention, see G. Bruce Doern & Monica Gattinger, *Power Switch: Energy Regulatory Governance in the Twenty-First Century* (Toronto: University of Toronto Press, 2003) at 28-32. For a more detailed overview of government policy spanning four decades, see *The Canadian Energy Record 1945-1985: An Overview of Energy Developments and Policy Decisions* (Ottawa: Department of Energy, Mines and Resources, 1987).

109. G. Bruce Doern & Glen Toner, *The Politics of Energy: The Development and Implementation of the NEP* (Toronto: Methuen, 1985) at 4-5.

110. S.C. 1980-81-82, c. 107, pt. I, ss. 1-33; pt. II, ss. 34-62.

The first Act introduced Petroleum Incentive Payments (PIPs) to encourage exploration in "Canada Lands" off-shore and in Canada's north; these payments covered up to eighty per cent of the costs of drilling on Canada Lands. Entitlement to PIPs was based on two factors. First, the Canadian Ownership Rate (COR) of participants was analyzed through share or interest ownership (determined by owners' citizenship, residency or immigration status in Canada); entitlement to PIP grants increased in proportion to a firm's COR, providing that a basic participation rate of fifty per cent was established.<sup>111</sup> Second, the *Canadian Ownership and Control Determination Act* adopted a Canadian control test: where an applicant demonstrated Canadian control, it progressed to the COR calculation upon which the PIP entitlement was determined on a sliding scale.<sup>112</sup> Only those companies that were at least fifty per cent Canadian-owned would be allowed to produce on Canadian lands. Full PIP grants were available only to companies that were seventy-five per cent Canadian-owned, while firms that operated inside a province or if they were not Canadian-controlled received only limited grants.<sup>113</sup> The NEP clearly attempted to place foreign investors at a competitive disadvantage and incite the sale of existing interests to Canadians.<sup>114</sup>

As with FIRA, the NEP encouraged corporations to retain or enhance Canadian control. The use of dual class share structures held value for applicants who were otherwise non-eligible to achieve Canadian status.<sup>115</sup> The example of Dome Petroleum provides perhaps the highest profile response to the NEP. Largely American-owned, Dome Petroleum created a subsidiary in 1981, Dome Canada Ltd. (DCL), with fifty-two per cent of its shares offered exclusively to Canadian investors.<sup>116</sup> Dome Canada's shares were listed on the TSE in 1981, carrying restrictions "to enable DCL to achieve and maintain a Canadian ownership level ... in order that DCL may qualify for the maximum level of grants available under the National Energy Program...."<sup>117</sup> Common shares could only be held by individuals and others who had a Canadian ownership level of 100 per cent,

111. Robert G.S. Hull, "The Assessment of Canadian Control under the National Energy Program" (1983) 8 Can. Bus. L.J. 19 at 19-21.

112. *Ibid.* The test for Canadian control relied heavily on the *Foreign Investment Review Act*, looking to various indicia to determine if a participating group directed the applicant's course of activity.

113. For an historical overview of the NEP, see Bothwell *et al.*, *supra* note 79 at 451-455. See also Doern & Toner, *supra* note 109.

114. Robert A. Donaldson, "Canadianization" in James M. Spence & William P. Rosenfeld, *supra* note 73, 93 at 99.

115. Hull, *supra* note 111 at 23.

116. Doern & Toner, *supra* note 109 at 228.

117. Prospectus (2 March 1981), TSE Submission, *supra* note 2, Appendix D at 15.

determined in accordance with directive from the Petroleum Management Agency to determine Canadian control.<sup>118</sup>

For some oil and gas firms wishing to expand while still qualifying for the most attractive PIP grants, dual class shares represented an important financing tool. Southern-owned ATCO Ltd., which had diversified into oil and gas exploration in the late 1970s, proposed a three-for-one split in January 1981 of each A and B common share into two non-voting shares and one voting share. The company indicated the reorganization was “particularly important in light of the recent Canadian federal government energy policy proposals, which place[d] a premium on Canadian ownership and control.”<sup>119</sup> The company’s shareholders approved the reorganization; the *Globe and Mail* commented that the move allowed the Southern family to retain fifty-two per cent control while raising equity capital, and also could assist the company to convince Ottawa that it was “highly Canadian-controlled and therefore eligible for the best breaks under the NEP.”<sup>120</sup> The share structure was “adopted to facilitate the raising of equity capital through the sale of [non-voting] shares, while at the same time enabling management to retain control and proceed with the corporate objective of broadening the company scope to the benefit all shareholders.”<sup>121</sup>

Both the NEP and FIRA were phased out with the newly elected Conservative government in 1984; however, nationalist policy, legislation, and discourse continued to be used to legitimate the use of dual class shares. By the early 1980s, many Canadians had become critical of FIRA, believing its operation had exacerbated the 1981-82 recession by discouraging external investment. Oil and gas producers had suffered when world oil prices dropped in the early 1980s. The anti-interventionist Mulroney government replaced the *Foreign Investment Review Act* with the *Investment Canada Act* in 1985.<sup>122</sup> Under the Act, a new agency was created called Investment Canada, and although having some regulatory powers, the agency’s main role was to attract new investment in Canada. By the mid-1980s, then, the issue of foreign intervention in the Canadian economy had lost some of its impetus:

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118. *Ibid.* For further information regarding Dome Petroleum and Dome Canada, see Peter Foster, *Other People’s Money: The Banks, the Government and Dome* (Toronto: Collins, 1983) at 87-98.

119. Martin Mittelstaedt “ATCO to seek approval of shareholders for share split, reorganization proposal” *Globe and Mail* (24 December 1980) B6.

120. Timothy Pritchard “NEP requirements may increase move toward non-voting issues” *Globe and Mail* (26 January 1981) B9.

121. Submission by C.S. Richardson, ATCO Ltd., to the OSC (11 September 1981) at 2 [ATCO Submission].

122. See Russell Deigan, *Investing in Canada: The Pursuit and Regulation of Foreign Investment* (Scarborough: Thomson Professional Publishing Canada, 1991).

Globalization of financial, commercial, and industrial markets undermined the regulatory and interventionist thrust of national governments that had been fostered by depression and war earlier in the twentieth century. While the National Energy Program marked the apogee of Canadian government activism (except in wartime), it seemed in retrospect to be a kind of last grasp than the logical culmination of half a century of interventionism.<sup>123</sup>

In the energy sector, foreign ownership restrictions in the oil and gas industry ceased to provide a rationale for the use of dual class share structures.<sup>124</sup> However, dovetailing the use of nationalist policy to legitimate the use of dual class shares was the economic recession of the early 1980s and market demand for common shares following the recession.

In 1984, one lawyer surmised, "The market likes non-voting or restricted voting shares. It gobbled them up."<sup>125</sup> The reality is that the market had little choice. Post-war growth had slowed by the 1970s and by 1981, both inflation and interest rates had risen and Canada sank into a full-blown recession. When the economy began to recover, the demand for common shares soared. Pension funds, in particular, increased their investments in common stocks during this time period.<sup>126</sup> The *Financial Times* reported in March of 1983, "Institutional investors are hungry for more common equity to put in their portfolios. At the same time, cash-starved corporations are eager to provide them with new issues in common stock."<sup>127</sup> For corporations carrying high debt, the renewed investor demand represented the first opportunity since the recession began in July 1981 to wind down their high levels of debt.<sup>128</sup> At the same time, "Many... issuers took the preliminary step of creating new classes of restricted shares prior to their public offerings and, as a result, the number and market value of publicly-traded restricted shares rose dramatically."<sup>129</sup> After the recession, then, many firms used dual class share structures to recover from depressed markets and expand without losing control.

For example, ATCO's stock split in 1981 was undertaken not only to retain control in the hands of the Southern family, but to counter the

123. Taylor & Baskerville, *supra* note 82 at 464.

124. By the end of 1984, approximately 20 companies in the oil and gas sector listed non-voting or subordinate voting shares on the TSE: (December 1984) TSE Review.

125. Allan Robinson "Non-voting share fight heats up" *Globe and Mail* (8 June 1984) B9.

126. Jacquie McNish "The rush for new equity" *Financial Times of Canada* (21 March 1983) 1.

127. *Ibid.* Laidlaw Transportation also provides an interesting example: in 1983, the company listed new non-voting shares on the TSE not because the company required more equity capital, but because the market was so strong.

128. *Ibid.* at 6.

129. OSC, "Position Paper Draft and Interim Policy on Restricted Shares and Request for Comments" (2 March 1984) 7:9 O.S.C. Bull. [OSC Position Paper].

massive debt the company had acquired in expansion. Analysts suggested that any new financings would help the company reduce its high debt/equity ratio and lay the groundwork for future expansion.<sup>130</sup> Similarly, from 1981 to 1983, Norcen Energy Resources Limited (Norcen) completed major acquisitions, which involved the purchase of \$500 million in mineral resource assets. The company anticipated a long-term trend of acquisitions and an increased need for equity.<sup>131</sup> It was with this future growth strategy in mind, a company representative stated, that Norcen undertook a stock split in 1983.<sup>132</sup>

Similarly, Magna reorganized its share structure in 1978 and created subordinate voting shares. The automobile industry, however, was hard hit in 1981-82. At the end of 1983, Magna issued additional class A subordinate voting shares to reduce debt and increase equity for plant expansion. The company's legal counsel asserted that the capital philosophy of Magna was to ensure stability in times of high interest rates and depressed markets.<sup>133</sup> Management, however, did not wish to relinquish control of the corporation or increase its debt/equity ratio. Class A subordinate voting shares, he claimed, were the catalyst that allowed for Magna's rapid growth: "Had that growth required a shift of control through the issue of Class B [voting] shares, it would never have taken place."<sup>134</sup>

Rogers Cablesystems had also accumulated massive debt while embarking on major expansion in the early 1980s; Rogers's president advocated the use of non-voting shares to expand while maintaining control as demanded by broadcasting legislation. To accommodate its plans, Rogers indicated that it would need to access equity markets regularly due to the highly capital intensive nature of the cable industry.<sup>135</sup> "The use of non-voting securities," the company asserted, "represent[ed] an ideal solution to the two somewhat conflicting objectives of raising large amounts of capital while maintaining stability and control."<sup>136</sup>

Within this regulatory and market context, there was a tremendous rise in the number of companies listing dual classes of shares on the TSE in the late 1970s and early 1980s. Seven new classes of non-voting, subordinate voting or restricted voting shares were listed on the TSE in the 1940s, thirteen in the 1950s, and twelve in the 1960s.<sup>137</sup> In 1979, sixty-

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130. Mittelstaedt, *supra* note 119.

131. Submission of William T. Kilbourne, Vice-President, Legal and Secretary, to the OSC (13 April 1984) [Norcen Submission].

132. *Ibid.*

133. Magna Submission, *supra* note 69.

134. *Ibid.*

135. E.S. Rogers, *supra* note 106 at 5.

136. *Ibid.*

137. OSC Position Paper, *supra* note 129.

four companies listed dual class shares on the TSE, while this number had increased to 130 in 1983.<sup>138</sup> The use of non-voting shares was clearly expanding beyond helping Canadian corporations retain their Canadian status. As we demonstrate in the next section, Canadian institutional investors were increasingly purchasing non-voting shares, not the foreign investors corporations employing the structure claimed non-voting shares were for. It remained convenient to use the argument of protecting Canadian business from foreign domination but the persistence of dual class share structures clearly had other motivating rationales.

## II. *Responses to dual class shares*

### 1. *Invest with your feet to mandatory coat-tail provisions*

Dual class shares are inconsistent with core Canadian corporate values such as achieving top performance while limiting agency costs. In addition, they are inconsistent with core Canadian values surrounding democracy. With respect to corporate performance, a body of empirical data suggests that in Canada dual class shares actually lower the market price of such a company's shares because of an inherent bias in the market against companies with these share structures. For example, one study reporting on a comparison with American rivals, found that the profitability of such Canadian corporations was significantly below their American rival industries and other Canadian companies with conventional voting rights for equity.<sup>139</sup> A different study reached a similar conclusion by considering market values after an announcement of a dual class share issue, and found that the wealth was less than before the announcement.<sup>140</sup> One reason for this result is that dual class shares can turn off investors given that they bear the full risk for the actions of management but have little or no voice in corporate affairs. This narrows the pool of capital that such corporations can attract when raising equity. The result is an increased cost of capital for such corporations and a market for shares in such corporations that is less liquid.

Not only are dual class shares inconsistent with values surrounding corporate performance, they also bear a striking resemblance to the undemocratic Canadian political environment predating suffrage. That is, dual class shares have created a class of second-class corporate citizens in Canada, such as pensioners, that bear full risk for the actions of

138. *Ibid.*

139. Paul Halpern & Ron Daniels, "The market and the closely held corporation in Canada: the implications of concentrated share ownership for corporate performance" (1996) 9:1 Can. Inv. Rev. 49 [Halpern].

140. V. Dimitrov & P. Jain, "The Effect of Dual Class Recapitalization on Long-Run Stock Performance" (2003) Working paper on file with the authors, obtained from SSRN Website.

management but are given little or no voice in corporate affairs. The role of democratic values in the corporate sphere has taken on an enhanced significance with the growing recognition that Canadian corporations hold an increased importance in dictating the ways that Canadian citizens lead their daily lives, in contrast to other institutions such as the Crown and Canadian government.<sup>141</sup> Accordingly, increased emphasis is being placed on democratizing all aspects of civil society.

Concerns surrounding democratic values can also be rooted in corporate finance literature and can be framed in the context of a reformulated version of the traditional Berle and Means agency problem. That is, for corporations with dual class shares the central agency problem is that of controlling shareholders taking advantage of minority shareholders, rather than the traditional problem of professional managers who are unaccountable to shareholders. In dual class share corporations, this occurs because such shareholding structures violate the principle of one-share, one-vote and accordingly corporate actions may be made without the true support of the majority of shareholders. The lack of democracy or the central agency problem remains unchecked because dual class shares allow for management entrenchment. With unequal voting rights, prospective purchasers and large investors effectively lose the chance to present a purchase offer to the owners of publicly-held corporations: all of the corporation's shareholders. Instead, prospective acquirers must obtain the blessing of the controlling shareholders, no matter how tiny the ownership position, before trying an acquisition. Similarly, dual class shares inhibit competition for control, since voting strength is concentrated in friendly hands.

The separation between economic ownership and control leads to the entrenchment of an owner-management group. Further, such disparity may invite controlling shareholders to engage in behaviour that negatively impacts the unit value of the corporation's stock, but that provides direct benefits to the controlling shareholders. The starkest example of such activity is the tunnelling or transferring of assets among firms controlled by the controlling shareholders so as to ensure that the assets are in the firm where cash flows accrue mainly to the controlling shareholder.<sup>142</sup>

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141. J. Abbott & M. Achbar, "The Corporation," DVD (Canada: Big Picture Media Corporation, 2003). The Corporation traces the birth of the corporation as a legal person through history and uses the diagnostic criteria of the World Health Organization to diagnose the modern day corporation as a psychopath. See also, J. Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2004).

142. R. Morck, D. Stangeland & B. Yeung, "Inherited Wealth, Corporate Control, and Economic Growth: The Canadian Disease?" in R. Morck, ed., *Concentrated Corporate Ownership* (Chicago: University of Chicago Press, 2000).

Specifically, it has been suggested that in comparison to corporations with dual class shares, corporations with a single class of shares utilise more restrained stock option plans, more reasonable executive compensation and more transparent accounting.<sup>143</sup>

When dual class shares were first introduced into the Canadian market in the 1940s, because there were so few companies employing such a structure and little opposition, they did not have to be justified. However, it was in this period that arguments based on the benefits of flexibility, long-term planning and targeted use of expertise could have justified their existence to public shareholders. In the initial period, the idea that dual class shares were in the interest of public shareholders and other corporate stakeholders because managers could concentrate on what they knew best - maximizing shareholder wealth by taking a long-term value approach - and worry less about short-term performance, may have been accurate. At that time, founders often did have a longer-term vision for the business than investors who tended to focus on more immediate returns. Accordingly, in that period both public and controlling shareholders could have benefited from the dual class share mechanism. That is, by allowing growing firms and firms owned by family entrepreneurs to raise financing without diluting voting control of the company or increasing debt without having a negative impact on shareholder wealth, dual class shares provided a way of financing a growth company while allowing the founder to maintain control.

While factors such as flexibility, long-term planning and targeted use of expertise may have accurately represented the benefits of using dual class shares when they were first introduced, recent Canadian academic studies have challenged these benefits in the current context. In particular, two studies have challenged the long-term planning or flexibility advantage of dual class shares for family-controlled corporations. For example, Morck et al. found in their 2000 study that Canadian family-controlled corporations under-invest in research and development relative to their industry peer firms of similar age and size.<sup>144</sup> This result suggests a limited commitment to long-term value or planning. Similarly, Paul Halpern and Ron Daniels reported that firms belonging to one of Canada's family pyramids, the Bronfman family, were more highly leveraged compared to comparable firms.<sup>145</sup> One potential explanation for this result is that because investors

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143. *Ibid.*

144. Ron Daniels & Ed Iacobucci, "Some of the Causes and Consequences of Corporate Ownership Concentration in Canada" in R. Morck, ed., *ibid.*

145. Halpern, *supra* note 139.

are more reluctant to purchase inferior voting stock of such firms, firms with dual class shares have to rely more heavily on debt-financing.

As more corporations turned to dual class financing in the 1980s, the economic and democratic concerns surrounding dual class shares caught the attention of securities regulators and other stakeholders. Nationalist policies, legislation, and discourse were used to respond to regulators and other corporate stakeholders who became concerned with the proliferation of dual class shares. The Ontario Securities Commission (OSC) adopted a disclosure-oriented approach, failing to pursue the more interventionist approach favored by shareholder activists. Quasi-regulators, such as the TSE and self-regulatory bodies such as the Investment Dealers' Association (IDA) also took positions on the use of dual class shares. The TSE advocated mandatory coattail provisions for future issues, while the IDA recommended full disclosure of the attributes of restricted shares. Shareholders and issuers, too, expressed their opinions with regard to dual class shares; the most vocal opponents included institutional investors, exercising an increasing voice that accompanied their growing equity participation in Canada's stock markets.

It was the TSE that prompted the review of dual class shares by releasing a discussion paper on October 2, 1980. In its paper, the TSE requested comments as to the appropriateness of restricting foreign ownership through securities traded on the TSE, and if so, whether there was adequate disclosure to prevent confusion among industry professionals and public shareholders regarding non-voting, multiple voting or restricted shares.<sup>146</sup> The discussion paper noted that in Ontario, the issues surrounding the use of such shares had assumed greater significance with the revised take-over provisions of the 1978 *Securities Act*.<sup>147</sup>

In response to the TSE's discussion paper, the IDA spoke out against any move by the stock exchange to limit non-voting or restricted shares, suggesting that such a move would "fly in the face of government policy supporting Canadian ownership and would also discourage equity capital financing."<sup>148</sup> The IDA pointed out that government policy dictated that the national economic interest was advanced by greater Canadian ownership in key industries such as banking, communications, and oil and gas. In addition, the IDA noted that a number of companies faced restrictions on foreign ownership to maintain their eligibility status under FIRA, while

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146. Toronto Stock Exchange, "Discussion Paper re Listing of Non-voting Multiple Voting or Restricted Voting Common Shares" (2 October 1981).

147. See part XIX of the *Securities Act*, *supra* note 40.

148. Dennis Slocum "IDA against restricting non-voting shares listing" *Globe and Mail* (14 February 1981) B2.

other companies faced legal restrictions on ownership in their incorporation documents (such as Nova Corp. of Calgary and the chartered banks).<sup>149</sup>

The OSC responded to the debate in June 1981, by issuing interim policies 3.58 and 3.59. Interim policy 3.58 pointed out that the securities commissions of Ontario, Quebec, and Manitoba and the Superintendent of Brokers of British Columbia were all concerned with recent public offerings of equity securities which carried non-voting or restricted voting rights (referred to by the policy as "uncommon equity securities").<sup>150</sup> The policy announced the OSC's intention to hold a public hearing in October of that year; the Commission des Valeurs Mobilières du Québec (CVMQ) proposed a hearing around the same time, while the other provinces were invited to join the OSC hearing. Policy 3.59 stated that until a decision had been made following the hearing, no prospectus, statement of material facts or rights offering with respect to a distribution of uncommon equity securities would be accepted for filing by the commission.<sup>151</sup> The TSE imposed a similar moratorium on the approval of listing applications for such securities until after the OSC hearing. The Alberta Securities Commission chose not to place any restrictions on the trading of non-voting, subordinate voting or restricted voting shares, "sympathetic to the needs of its particular clientele," oil and gas companies.<sup>152</sup> The president of the exchange stated that a moratorium was "not in the best interests of the companies where control is very important. We have no reason not to list non-voting shares."<sup>153</sup> He added that non-voting shares had been in use for a long time and had not created any problems to his knowledge.<sup>154</sup>

At the onset of the OSC hearing, OSC chairman Henry Knowles reassured attendees, "You can disabuse yourself of the fear shares will be delisted as a result of this hearing."<sup>155</sup> The *Financial Post* reported that submissions at the hearings came down hard on the side of "economic realities and the need for flexibility in corporate financing."<sup>156</sup> The article pointed to some criticisms of the use of dual class shares, including those of the president of Guardian Capital Group, who expressed the fear that "management [was] reducing money at risk and taking out good salaries

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149. *Ibid.*

150. OSC Policy 3.58, (26 June 1981) 1:23 O.S.C. Bull. at 1E-9E. Uncommon securities were defined as equity securities that were non-voting, did not carry the right to vote in all circumstances, or with respect to which, as a class, the voting power was limited because of the issuance of securities of another class carrying multiple voting rights.

151. OSC Interim Policy 3-59, (26 June 1981) 1:23 O.S.C. Bull. at 46E-48E.

152. Stewart-Patterson, *supra* note 38.

153. Stewart-Patterson, *supra* note 38.

154. Stewart-Patterson, *supra* note 38.

155. Allan Robinson "'Uncommon' share study underway" *Financial Post* (3 October 1981) 27.

156. Robinson "'Uncommon' shares practical, backers argue" *Financial Post* (10 October 1981) 38.

and perks. The low equity commitment of family controlled companies ... is clearly a negative sign.”<sup>157</sup> Critics of dual class shares, however, appeared few and far between. Nationalist concerns were used to justify their existence. The vice president of Turbo Resources Ltd. argued, for example, that nonvoting shares “enable[d] Canadian companies to tap foreign capital markets without the risk of losing their Canadian ownership status.”<sup>158</sup> Harris Steel Group’s president stated, “I believe most entrepreneurs would refuse to go public and not expand if there was a risk of loss of control.... As controlling shareholder I am not prepared to risk loss of control.”<sup>159</sup> The unique capital requirements of Canada and the size of Canadian corporations compared with their American counterparts, the *Financial Post* noted, were reasons put forth to justify the listing of dual class shares.<sup>160</sup>

At the hearings the TSE, backed by the IDA, asked securities regulators to lift the moratorium on non-voting shares.<sup>161</sup> The TSE advocated new disclosure requirements as well as amendments to Part XIX of the *Securities Act*, so that the rules concerning takeover bids would apply when a bid was made for non-voting shares.<sup>162</sup> With regard to take-over bids and the possibility of non-voting shares being left out of a premium, the TSE suggested that the exchange require the inclusion of protective provisions in the attributes of newly listed shares, rather than amending the *Securities Act*.<sup>163</sup> The TSE opposed a recommendation from the OSC that some of the proposed regulatory changes and policy issues arising from dual class equity be referred to a special committee of the Ontario legislature.<sup>164</sup>

After analyzing the various submissions, the OSC published a new Interim Policy 3.58 on November 20, 1981. The OSC determined that it was not contrary to the public interest to permit the distribution of “restricted shares,”<sup>165</sup> provided that certain conditions as to initial and continuous disclosure were met. The Quebec and British Columbia securities

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157. *Ibid.*

158. *Ibid.*

159. *Ibid.*

160. *Ibid.*

161. Jack Willoughby “TSE pushes bid for share vote” *Globe and Mail* (1 October 1981) B8.

162. TSE Submission, *supra* note 2 at 21-23.

163. TSE Submission, *supra* note 2 at 16-19.

164. “TSE pushes bid for share vote”, *supra* note 161.

165. The policy defined restricted shares as those shares which were not common shares, but which carried the right to an unlimited or substantial participation in the earnings or assets of an issuer on liquidation or winding up. Common shares were defined as those shares that were fully participating and fully franchised, where the holder of each share held a residual right to share in the earnings of the issuer and in its assets, and a right to vote each share in all circumstances.

regulators, as well as the TSE and MSE adopted similar policies.<sup>166</sup> In the case of takeover bids, the Montreal Exchange “strongly urge[d]” issuers to allow non-voting shares a special right to vote, rather than mandating compliance, because the Quebec *Securities Act*, like Alberta’s, did not require that follow-up offers be made in the event of takeover bids for a particular class of shares.<sup>167</sup> Similar to the OSC, the CVMQ met the issue of non-voting shares with “lukewarm enthusiasm,” but had been persuaded that they held a place in corporate financing.<sup>168</sup>

The OSC lifted its moratorium on listing restricted shares in January of 1982, and the policy was fine-tuned in April of that year with the assistance of the TSE. The effect of the policy was to give additional power to the OSC and for the TSE to have the final determination in a stock’s classification.<sup>169</sup>

Two years would pass before the OSC published its own position paper on March 2, 1984. OSC chairman Peter Dey, who had been appointed since the 1981 hearings, had advised late in 1983 that the OSC would intervene when companies used non-voting shares in ways that obviously abused the interests of common shareholders, but expressed faith in the ability of financial communities to address concerns before any such intervention might occur.<sup>170</sup> In its March position paper, the OSC pointed out that since the 1981 hearings the use of restricted shares as a financing device had increased<sup>171</sup> and concerned investors had approached the commission requesting that it take steps for their regulation. Although the OSC noted that abolishing dual class shares could cause serious problems for the capital markets, the commission aimed to take a more active role in regulating the use of dual shares than the disclosure requirements laid out in the previous interim policies. As such, the OSC suggested the “appropriate approach” would entail “giv[ing] investors a stronger voice in the corporate action required to create these shares and to prescribe certain minimum standards for the terms of these shares to protect holders in the event of a take-over bid for the issuer.”<sup>172</sup>

166. OSC Position Paper, *supra* note 129 at 6.

167. Wendie Kerr “Holders of non-voting shares on MSE protected” *Globe and Mail* (21 November 1981) B2.

168. *Ibid.*

169. Dennis Slocum “Disclosure Policy” *Globe and Mail* (9 April 1982) B7.

170. Dennis Slocum “OSC monitoring use of non-voting shares” *Globe and Mail* (1 December 1983) B3.

171. OSC Position Paper, *supra* note 129 at 1, 7-8. Note however, that during 1982 there was a decrease in the number of new classes of dual class shares listed on the TSE, partly due to the moratorium announced in 1981, and also due to decreased activity of the capital markets because of economic recession.

172. OSC Position Paper, *supra* note 129 at 2.

The 1984 position paper recommended several additions to the interim policy (now designated Policy 1.3). First, the OSC indicated that a receipt would not be issued for any prospectus for a class of restricted shares that did not include protective provisions to ensure that the holders of such shares held the opportunity to participate in any take-over bid made for the common shares, where an offer on the same terms and conditions was not made simultaneously for the restricted shares (the take-over bid protection requirement). Second, where an issuer proposed a fundamental change in the capital structure that would have the effect of converting common shares into restricted shares, the reorganization would require the approval of a majority of the minority shareholders (the majority of the minority requirement). Finally, where a voluntary offer for restricted shares was made, the provisions of Part XIX of the *Securities Act* were to be complied with (the voluntary take-over regulation requirement).<sup>173</sup> These amendments were made effective immediately on an interim basis. The OSC concluded that the issuance of restricted shares without protective orcoat-tail provisions was contrary to legislative policy.<sup>174</sup> The CVMQ immediately invoked the Ontario changes, while British Columbia intended to follow Ontario after receiving industry feedback.<sup>175</sup> The *Financial Post* commented that the OSC policy held the markings of Peter Dey's approach to securities regulation: a compromise drafted after consultation.<sup>176</sup>

The OSC received forty-six written submissions in response to the discussion paper. On May 2, 1984, the *Globe and Mail* reported on the various submissions that had been forwarded to the OSC, indicating that both opponents and proponents of non-voting shares had criticized the policy.<sup>177</sup> Several submissions suggested the OSC had exceeded its authority, and that the decision to extend shareholder rights and to amend the *Securities Act* should be subject to legislative approval.<sup>178</sup> Highly outspoken was Edward Rogers, vice-chairperson of Rogers Cablesystems, who alleged that the OSC was "imposing a form of censorship by denying

173. OSC Position Paper, *supra* note 129 at 3-4.

174. For the purpose of the policy, "protective or coat-tail provisions" meant that the attributes of the shares were such that the holders of restricted shares would have an opportunity to participate in any take-over bid or other change in control on the same terms as common share-holders, generally through a right to convert restricted shares into common shares. OSC Position Paper, *supra* note 129 at 20. The recommendations of the position paper were laid out in Interim Policy 1.3, (16 March 1984) 7:11 O.S.C. Bull. 1197.

175. Ann Shortell "OSC adopts new position on restricted-voting shares" *Financial Post* (10 March 1984) 6.

176. *Ibid.*

177. Allan Robinson "Views on non-voting shares strongly held" *Globe and Mail* (2 May 1984) B18; "OSC's interim policy draws criticism" *Globe and Mail* (2 May 1984) B18.

178. Allan Robinson "OSC's non-voting share policy assailed" *Globe and Mail* (2 May 1984) B1.

investors the right to purchase non-voting shares,” considering some investors preferred higher dividends to the right to vote.<sup>179</sup> Lawyers for ATCO Ltd. of Calgary expressed the view that “[i]f one accepts the proposition that an entrepreneur should be permitted access to the equity markets without being forced to lose control, then the issue of common shares is not a viable alternative.”<sup>180</sup> On the other hand, the United Church of Canada, whose equity investments totaled over \$239,000,000 (including the pension funds of its employees), noted that its fundamental concern was shareholder democracy; for the church, non-voting shares violated principles of stewardship that were fundamental to ownership.<sup>181</sup>

The *Financial Post* suggested that opposition to restricted and non-voting shares was overblown: some believed that it was limited to a small group of institutional money managers “who [had] been able to talk into the right ears,” OSC Chairman Peter Dey’s, while others believed it was an example of increasingly vocal institutional shareholders.<sup>182</sup>

The commission held additional public hearings in June 1984 to address the revisions to the interim policy. Discussion proved to be heated. The issue had gained prominence in the media due to both outspoken critics and proponents.<sup>183</sup> Rogers bluntly expressed his company’s disdain for coattail provisions: “We oppose coat-tail policies and will not implement them.”<sup>184</sup> Allan Waters, president of CHUM Ltd., also opposed the use of coat-tail provisions and complained about the “garbled and distorted writing” of the *Globe and Mail’s* coverage of the non-voting share issue.<sup>185</sup>

Following the hearings, the OSC amended its policy, representing a retreat from the disclosure-oriented approach the commission had originally adopted. Interim Policy 1.3, as amended, deleted the take-over bid protection requirement, while retaining the “majority of the minority” and the voluntary take-over regulation requirements.<sup>186</sup> Peter Dey summarized the OSC’s change in approach: “What we’re saying is invest

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179. *Ibid.*

180. ATCO Submission, *supra* note 121 at 4.

181. Submission of the United Church of Canada to the OSC (31 December 1983).

182. Ann Shortell “‘Uncommon’ shares face decision time” *Financial Post* (25 February 1984) 2.

183. See, e.g., Dennis Slocum “Distrust of non-voting common shares grows” *Globe and Mail* (3 February 1984) B1; Richard Spence “OSC will look again at non-voting share rules” *Financial Times of Canada* (6 February 1984) 3; “With votes for all,” Editorial, *Globe and Mail* (19 March 1984) P6; “Views on non-voting shares strongly held” *supra* note 177; “OSC’s interim policy draws criticism,” *supra* note 173; “OSC’s non-voting share policy assailed” *supra* note 178.

184. Allan Robinson “Non-voting share fight heats up” *Globe and Mail* (8 June 1984) B9.

185. Allan Robinson “OSC’s non-voting decision awaits wider consultation” *Globe and Mail* (9 June 1984) B3.

186. OSC, “Statement of the Ontario Securities Commission Concerning Restricted Shares” (11 October 1984) 7:41 O.S.C. Bull. 4296.

with your feet. Walk away from what you don't like."<sup>187</sup> In response to the concerns of issuers regarding the implementation of coat-tail provisions, the commission decided that take-over protection to holders of restricted shares was better left to the private sector.<sup>188</sup> Second, the OSC expressed concern that any legislative provision would give increased credibility to restricted shares in the marketplace.<sup>189</sup> The final form of Policy 1.3 was published on December 21, 1984.<sup>190</sup> In general, the policy required that (1) holders of restricted shares and prospective purchasers of restricted shares be made aware that restricted shares had different rights than those attached to an issuer's common shares, (2) holders of restricted shares received those materials sent to holders of common shares, (3) holders of restricted shares be provided with certain rights to attend and speak at meetings of voting shareholders, and (4) shareholders held the right to approve, by a majority of the minority vote, the creation and issuance of restricted shares.<sup>191</sup> Shares that carried a right to vote subject to some limit or restriction on the number or percentage of shares owned by persons or companies that were not Canadians were exempted from the policy.<sup>192</sup> Securities administrators of all other provinces and territories adopted the new policy.<sup>193</sup>

Although securities regulators declined to mandate coattail provisions, the TSE stepped in to require them a few years after the OSC policy was finalized in response to a bid for the Canadian Tire voting shares. Events that transpired after the bid was announced demonstrate how the interests of employees, as holders of non-voting shares, began to converge with other shareholders. Both groups began to challenge the family control and employee reward functions of non-voting shares. In November 1983, Canadian Tire planned a five-for-one stock split (each voting share was

187. Arthur Johnson "Restricted share holders lose safeguard" *Globe and Mail* (12 October 1984) B1.

188. *Supra* note 186 at 6. A number of issuers had indicated that although the interim policy was not meant to be retroactive, the market might require the terms of outstanding shares to conform with shares issued after the policy, which could in turn trigger appraisal rights in favour of the holders of outstanding shares. An amendment to the *Securities Act* could address this problem, the OSC statement noted, by requiring that any offeror bidding for the common shares of an issuer with a class of restricted shares to make an identical bid to the holders of restricted shares. This scheme, however, posed two problems: first, restricted shares often held preferential dividends and would necessitate a determination by the OSC as to what would be a fair equivalent of the offeror for the common shares, a process that could prove to be time-consuming and tie up the resources of both the commission and the private sector.

189. *Supra* note 186 at 5-6.

190. "O.S.C. Policy 1.3 Restricted Shares" (21 December 1984) 7:51 O.S.C. Bull. 5358.

191. *Ibid.*

192. *Ibid.* at 5358.

193. Tessa Wilmott "Investors given choice over restricted shares" *Financial Post* (27 October 1984) 29.

divided into four non-voting and one voting share) and a "better deal" for holders of non-voting shares that included takeover protection, if a majority of common shares were sold as a result of a general offer to all common shareholders.<sup>194</sup> In addition, class A shareholders would be entitled to elect three independent directors, and all restrictions on class A shares were to be dropped. In devising this "package of sweeteners for the A shares," the directors held discussions with senior staff of the OSC, who at the time were reviewing OSC policy on restricted shares.<sup>195</sup> Shareholders approved the stock split in December 1983. In response to the new class A shares' attributes, Canadian Tire Chairman A.E. Barron observed, "In effect, this corporation is changing from a family-controlled corporation to a public corporation because of the change in directors."<sup>196</sup> Canadian Tire President Dean Muncaster had advised in a letter to shareholders that the bylaw was proposed "with a view to putting the holders of class A shares in a position similar in effect to that of the minority holders of common shares in the event of a change in control of the corporation pursuant to a takeover bid."<sup>197</sup> Just prior to the stock split, the Billes children had acquired a 60 per cent control block of the company's voting shares.<sup>198</sup> The Billes's planned to sell the non-voting shares made available through the stock split to help pay back the \$76.7 million in loans they incurred to acquire their control block in 1983.

When the Billes children announced just three years later that they intended to sell their control block, Canadian Tire employees and shareholders were astounded. At the time of the stock reorganization in 1983, few shareholders had contemplated a transfer in control of the company. In December 1986, C.T.C. Dealer Holdings (Dealers) made a bid to acquire control of Canadian Tire through an offer to purchase forty-

194. Paul Goldstein "Canadian Tire plans a split, better non-voting potential" *Globe and Mail* (23 November 1983) B2.

195. *Ibid.*

196. "Holders let Canadian Tire split stock" *Globe and Mail* (16 December 1983) B4.

197. Karen Howlett "Canadian Tire probe to focus on fairness" *Globe and Mail* (18 December 1986) B1 at B2.

198. The Billes children acquired the control block in defence of a takeover bid by Imasco Ltd. In 1983, founder J.W. Billes's thirty per cent block of Canadian Tire stock came up for sale. Billes had died in 1956; the thirty per cent block had been controlled by a voting trust up to 1983. The beneficiaries of the Billes estate included twenty-three charities, who desired that the share block be sold to provide them with more income; family members, on the other hand, opposed the sale. As a result of a legal dispute over the timing of the sale, the Ontario Supreme Court ordered the sale of control block in 1983. The family of A.J. Billes (the brother of J.W. Billes) controlled thirty per cent block of the company at this time. Under a complex trust set up in 1962 to protect the family control, the A.J. Billes family possessed first right to bid for the thirty per cent block. The children of A.J. Billes (Alfred, David and Martha Billes) gained control of the voting block by bidding \$73 per share (\$76.7 million). Imasco had attempted to take over Canadian Tire by bidding \$75 per share, but withdrew its bid after meeting with resistance from the Billes family and management.

nine per cent of the voting shares; that October, brothers Alfred and David Billes had announced that their combined forty-one per cent of the voting stock was up for sale. Their sister Martha Billes owned another twenty per cent of the voting shares, while Dealers owned 17.4 per cent, and head office employees owned twelve per cent of through the company's employee profit-sharing plan.<sup>199</sup> Non-voting shareholders owned ninety per cent of Canadian Tire's equity. Dealers, according to the press, made the offer to ensure the unique philosophies integral to Canadian Tire's corporate culture be retained: "Hallmarks of the company's tight, family approach [were] its tradition of sharing profits among all employees and the network of independent Canadian Tire dealers."<sup>200</sup>

Because Dealers offered to take up only forty-nine per cent of the voting shares, employees and other shareholders who held non-voting shares stood to be left out of any premium: employees who just three years prior thought they had been afforded protection in this precise scenario. The *Globe and Mail* reported that through Canadian Tire's profit-sharing plans, many of the company's non-voting shareholders were employees who were opposing the Dealers bid: "Securities regulators and stock exchanges have been bombarded by calls and mail from Canadian Tire's non-voting shareholders, including the employees."<sup>201</sup> Many holders of the company's non-voting shares vowed never again to buy non-voting shares.<sup>202</sup> The OSC intervened with a temporary cease-trade order and held a hearing in December 1986, ultimately deciding that the proposed sale was contrary to public interest. Dealers appealed unsuccessfully to the Divisional Court of the Supreme Court of Ontario, and then to the Ontario Court of Appeal, which denied leave to appeal in April 1987.<sup>203</sup>

The convergence of public shareholders' interests and employees' interests following the Canadian Tire scandal that had erupted at the end of 1986 spurred the TSE to take action even in the face of nationalist rhetoric. On July 30, 1987, the TSE issued a notice to its members proposing a new policy on take-over protection for the holders of non-voting and subordinate voting shares.<sup>204</sup> The TSE mandated effective coat-tail provisions as a prerequisite to listing any new restricted shares, promising punitive action against anyone who structured a take over bid to avoid

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199. Karen Howlett "Closer scrutiny predicted for takeover protection clauses" *Globe and Mail* (22 December 1986) A18.

200. Karen Howlett "Canadian Tire dealers to reveal their offer for control of retailer" *Globe and Mail* (1 December 1986) B3.

201. "Canadian Tire probe to focus on fairness" *supra* note 197.

202. "Canadian Tire probe to focus on fairness" *supra* note 197.

203. *Canadian Tire Corporation* (1987), 10 O.S.C.B. 858 (O.S.C.), leave to appeal refused 35 B.L.R. (C.A.).

204. Clarence T. Hay, "Restricted Shares in Ontario" (1988) 14 Can. Bus. L.J. 257 at 289.

the intent of the policy. The TSE advised that the Montreal, Alberta and Vancouver stock exchanges had adopted the same policy and agreed to apply it uniformly.<sup>205</sup>

## 2. *Shareholder activism: institutional investors' opposition to dual class shares*

The rising prominence of institutional investors played a key role in the debate in the 1980s regarding how dual class shares should be regulated. The total equity holdings of Canadian banks, life insurance companies, trustee pension plans, trust and mortgage loan corporations, and investment funds grew (in 1986 dollars) from \$4.7 billion in 1969 to about \$85 billion in 1990.<sup>206</sup> A growing voice in corporate governance issues accompanied this increased equity participation.<sup>207</sup> Many institutional investors complained that they disliked non-voting or subordinate voting shares, but had no other alternative but to invest in them due to the relatively small size of the Canadian market and foreign investment restrictions attached to investment portfolios.<sup>208</sup>

A group of institutional investors, with an 11.5 per cent stake in Norcen (controlled by Conrad and Montagu Black), had opposed the stock split of the company in November of 1983.<sup>209</sup> Although the *Globe and Mail* advised that shareholders had approved the stock split without "serious challenge,"<sup>210</sup> the *Financial Post* recounted a different story. The motion required support from two-thirds of the shares represented at the meeting, and obtained approval from seventy per cent of the shares voted.<sup>211</sup> Only 76.8 per cent of Norcen's common shares voted, however, and the 34.5 per cent block controlled by Conrad and Montague Black represented 45 per cent of the votes in favor of the proposal. In comparing how minority shareholders voted, 23.2 per cent opposed the motion,

205. *Ibid.* See also Ralph H. Shay, "Five Years After the Canadian Tire Coattail Hearing A Retrospective" (December 1991) 3:3 Corp. Gov. Rev. 1 at 17.

206. Jeffrey G. MacIntosh, "Institutional Shareholders and Corporate Governance in Canada" (1995-96) 26 Can. Bus. L.J. 145 at 147.

207. For a discussion regarding the rising activism of institutional investors, see Jeffrey G. MacIntosh, "The Role of Institutional and Retail Investors in Canadian Capital Markets" (1993) 31 Osgoode Hall L.J. 371 at 380.

208. See, for example, Dennis Slocum "Some voting shares at premium over non-voting" *Globe and Mail* (20 February 1984) B1; "Non-voting share fight heats up" *supra* note 180; Brenda Daglish "Buzzed by B shares" *Financial Post* (4 April 1998) 9. MacIntosh has suggested that the relative illiquidity of the Canadian market and the lack of available investment options may diminish the attractiveness for institutional investors to sell when dissatisfied with market performance, and thus increase the allure of shareholder activism: MacIntosh, *ibid.* at 384.

209. Dennis Slocum "Non-voting share plan of Norcen is opposed" *Globe and Mail* (25 October 1983) B1.

210. Paul Goldstein "Norcen share plan approved" *Globe and Mail* (26 October 1983) B1.

211. Eric Evans "Nonvoting shares raise the ire of large investors" *Financial Post* (5 November 1983) 5.

and 19.3 per cent voted in support of it. Most opposition to the proposal came from institutional investors such as Canada Life Assurance Co., the Ontario Municipal Employees Retirement Board, and the Caisse de dépôt et placement du Québec. William Allen, vice-president of institutional services at Housser & Co., suggested that there were legitimate reasons for issuing non-voting shares (such as tapping into American equity), but cautioned: "I rather suspect that there are far too many corporations using this route as a means of increasing control of the corporation by the control group without their having to put up any additional funds."<sup>212</sup> Indeed, Conrad Black had faced intense opposition from minority shareholders in September 1980 when he attempted to turn Norcen into the central operating company of Black's group (Norcen, Labrador, and Hollinger-Argus),<sup>213</sup> as the deal was to be approved only by Norcen's board without an independent evaluation or shareholder vote. Faced with vocal opposition, Black withdrew his plans for reorganization by November of that year; it is likely this scenario was fresh in Black's mind when Norcen's stock split was proposed in 1983. Both the *Globe and Mail* and *Financial Post* indicated that it was unusual for institutional investors to be vocal about their concerns, but greater numbers were reacting to corporate maneuvers with which they disagreed.<sup>214</sup>

Institutional investors also spearheaded opposition to the attempted sale of the Billes family's control block of Canadian Tire's voting shares. Soon after Dealers' announced the proposed acquisition, it became clear that the offer had been structured to get around the coattail provision of the class A shares.<sup>215</sup> Members of the investment community responded to the proposed transaction with outrage. Stephen Jarislowsky, a vocal critic of non-voting shares and manager of a pension fund that owned about six percent of the class A shares, surmised, "The whole thing is extremely unethical."<sup>216</sup> If the dealers succeeded in their bid, Jarislowsky made it clear that legal action would ensue.<sup>217</sup> The *Financial Times* noted that investors, analysts, brokerage houses, and even Canadian Tire employees

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212. *Ibid.*

213. Jack Willoughby "Vote could scuttle Black's intentions for several firms" *Globe and Mail* (10 September 1980) B2.

214. "Nonvoting shares raise the ire of large investors," *supra* note 206; "Non-voting share plan of Norcen is opposed," *supra* note 209. For a contemporary discussion regarding the increasing activism of pension funds, see Eric Evans "Pension funds make corporate waves" *Financial Post* (25 June 1983) 9.

215. Karen Howlett "TSE extends trading halt in Canadian Tire shares" *Globe and Mail* (3 December 1986) B15.

216. Karen Howlett "Martha Billes to tender shares in Canadian Tire to dealers" *Globe and Mail* (4 December 1986) B4.

217. *Ibid.*

were rallying behind the company's non-voting shareholders.<sup>218</sup> A group of institutional investors, led by Jarislowsky and William Allen, launched a public fund-raising campaign to help fight the bid.<sup>219</sup> "This is a fight for fairness," the campaign's newspaper advertisements asserted.<sup>220</sup>

The Canadian Tire bid demonstrated that not all coattail provisions would protect holders of non-voting shares where takeover bids were made for common shares.<sup>221</sup> One of the immediate effects of the failed bid and OSC intervention was that companies with newly created dual classes of shares tended to issue subordinate voting rather than non-voting shares.<sup>222</sup> Reaction to the bid also represented the growing voice of institutional investors, who were no longer satisfied with justifications based on nationalist concerns in situations where public shareholders' rights were perceived to have been abused.

### *Conclusion*

An analysis of the growth of dual class share structures in Canada over the past six decades points to key themes: the concentration of ownership of Canadian business, the roles of multiple regulators in securities and corporate law, convergence between shareholders and other stakeholders' interests, and rising shareholder activism. However, operating alongside or in opposition to these themes, the theme that best accounts for the proliferation and continued use of dual class shares is the reliance on government policy, legislation, and discourse that addressed concerns regarding foreign ownership and domination of Canadian business. These concerns have been rooted in the reality of the composition of the Canadian corporate economy; however, they have often masked the inconsistency between the use dual class shares and core Canadian values. This dichotomy continues to hold true in the current context; however, institutional investors, whose interests have often converged with other corporate stakeholders, have played a key role in exposing inconsistencies between dual class shares and core Canadian values. Dual class shares have also been taken on by the media, which has also played a central role in highlighting these inconsistencies, particularly in the context of high profile corporate governance scandals.

Early in 2004, the Canadian Coalition for Good Governance, a lobby group representing institutional money managers (formed by Stephen

218. Caroline Meinbardi "Non-voting rights at stake in Tire bid" *Financial Times of Canada* (15 December 1986) 3.

219. "Canadian Tire probe to focus on fairness," *supra* note 197.

220. See advertisement, *Globe and Mail* (17 December 1984) B4.

221. See, e.g., Edward Greenspon "Coattails give little protection" *Globe and Mail* (13 March 1987) B3.

222. Shay, *supra* note 205 at 20.

Jarislowsky and Ontario Teachers' Pension Plan CEO Claude Lamoureux), advised large money managers to avoid investing in companies with dual class share structures because of the potential for abuse of minority shareholders.<sup>223</sup> Ontario Teachers' Pension Plan investment guidelines assert that dual class share provisions create a "second class" of common shares, that allocate voting rights in a manner inconsistent with economic ownership.<sup>224</sup> However, until 2005, institutional investors had little choice but to invest in firms with dual class share structures due to foreign ownership restrictions in their investment portfolios. Portfolio managers that require liquidity were forced to own non-voting shares if the non-voting stock is the more liquid class.<sup>225</sup>

The ability of institutional investors to avoid non-voting or subordinate voting shares has dramatically increased with the federal government's recent elimination of the thirty per cent limit on foreign content restrictions on RRSPs and pension funds. The announcement has led to speculation that companies with dual class share structures will suffer, prompting more companies with two classes of share to create a single class. Commentary in the press has suggested that shareholders, including institutional investors, now have the power to sell and find "worthier investments."<sup>226</sup> Companies with dual class shares have been sagging on the stock market since the February 2005 announcement: "it's hard to ignore the fact that pension funds are free to spend anywhere. They are no longer captives to the Canadian market."<sup>227</sup> The lifting of foreign investment restrictions in this sector may prove to be the tipping point that will significantly impact the prevalence of dual class share structures in Canada and the use of nationalist policies, legislation and discourse to legitimate this structure. It will be fascinating to observe how pervasive this tool remains in the current context, whether Canadian investors will exercise their options to invest globally, and whether the market will in fact drive companies with dual class structures to adopt one class of shares.

223. Wojtek Dabrowski "Group issues advisory on dual-class shares: Some 'fair and equitable'" *National Post* (13 February 2004) FP06.

224. See, e.g., the Teachers' Pension Plan statement on dual class share structures: "We support one class of shares. We will generally not support the creation or extension of dual-class share structures." Online: Ontario Teachers' Pension Plan <[www.otpp.com/web/website.nsf/web/Guidelines\\_DualClassShareStructures](http://www.otpp.com/web/website.nsf/web/Guidelines_DualClassShareStructures)>. For more on Claude Lamoureux's activism, see John Gray, "Shareholder No. 1" *Can. Bus.* (4 August 2003).

225. Jeffrey MacIntosh, "Institutional investors and corporate governance: Has the pendulum swung too far?" (Spring 1996) 9:1 *Can. Inv. Rev.* 36.

226. Keith Kalawsky "Power shifts to investors: Ignoring concerns of shareholders won't be as easy" *National Post* (24 February 2005) FP1.

227. Eric Reguly "Suddenly free, funds vote with their feet over dual-class shares" *Globe and Mail* (31 March 2005) B2.

